

BOARD MEMBER ORIENTATION TRAINING

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BOARD MEMBER ORIENTATION TRAINING

Learning Goals

At the conclusion of this workshop, board members will be able to:

- Explain their role in the protection of California consumers.
- List the key provisions of the Open Meeting Act and how it applies to them.
- Define “Ex Parte” communications and differentiate between acceptable and unacceptable communications with others, and be able to prevent unacceptable contact.
- List the parts of the Administrative Record and be able to review it with regard to a proposed board decision.
- Describe the basics of the enforcement process and the board’s role in that process.
- Explain the ethical issues that arise from the quasi-judicial nature of the Board member role.
- List the key steps in the legislative process and describe a board’s responsibilities with regard to legislation and regulations development.
- Explain the key functions of the Division of Legislative and Regulatory Review.
- Understand the different conflict of interest laws such as the Political Reform Act, Incompatible Activities, and Government Code Section 1090’s prohibition against self-contract.
- List the major administrative services provided to the boards by DCA and how these costs are allocated to the individual boards.



10 Principles for Highly Effective Board Members

1. Protection of the public shall be the highest priority for DCA board members in exercising their board's licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.
2. You are responsible for developing and setting policy and procedures as a State licensing and law enforcement agency.
3. Consumers expect that licensees will be qualified to perform at an entry level of competence. They expect a fair method of settling disputes that may arise between a licensed practitioner or business and a consumer.
4. A person who wishes to earn a living in an occupation should not be kept out unreasonably. That person should have easy access to all information about entering the profession, including testing and/or transferring a license to or from another state.
5. Board actions often affect competition within an industry. Public authority should enhance competition whenever possible, and avoid favoring one industry segment over others. Licensees have a right to expect good administrative practices and the elimination of unnecessary and burdensome requirements.
6. You have a responsibility to other board members to listen to them and to consider their views and contributions, to help determine good policy and helpful procedures, to contribute to fair determination of problems, and to help the board operate most effectively and efficiently.
7. An effective board member:
 - is able to work with a group to make decisions
 - understands and follows democratic processes
 - is willing to devote time and effort to the work of the board

- works to find alternative solutions to problems whenever necessary
 - has good communication skills
 - recognizes that the goal of the board is the service and protection of the public
 - is aware that authority is granted by the law to the board as a whole, not to any member individually, and can only be used by vote of the majority of board members
 - avoids becoming involved in the daily functions of staff
 - delays making judgments until adequate evidence is in and has been fully discussed
 - doesn't let personal feelings toward others affect decisions
8. Public members are not expected to be, indeed are not supposed to be, technically expert or experienced in the licensed occupation. They provide a unique public perspective on licensing and enforcement.
9. An effective board member does not disclose details of board activity unless and until they become part of the public record. The investigation procedure, which includes informal hearings or conferences, may not be part of the public record. Any disclosure of such information should be made only after consultation with legal counsel.
10. Effective board members remember that they are seen as representatives of the board and the Department when they appear at industry or professional gatherings and must not appear to speak for the board or the Department unless specifically authorized by the board or the Department to do so.

✧ This information was gathered from various Department of Consumer Affairs resource manuals

Glossary of Definitions



ALJ	Administrative Law Judge—a judge from OAH who presides over license denial and discipline cases (the trier of fact) and makes a Proposed Decision to the board that includes findings of fact, conclusions of law, and a recommended penalty.
APA	Administrative Procedure Act—the law that sets out the procedure for license denial and license discipline, to meet constitutional requirements for due process of law.
Bagley-Keene Open Meeting Act	Name of the law that requires public meetings and distribution of meeting notices and agendas.
Conflict of Interest Laws	Refers to a number of laws which relate to a person's personal interest which conflicts with the public interest.
DAG	Deputy Attorney General—an attorney from the Office of the Attorney General who prosecutes license denial and discipline cases.
Gross negligence	An extreme departure from the standard of practice.
Incompetence	Lack of knowledge or skills in discharging professional duties.
Negligence	A departure from the standard of practice.
OAH	Office of Administrative Hearings—the state agency that provides neutral (unaffiliated with either party) judges to preside over administrative cases.
OAL	Office of Administrative Law—the state agency that reviews regulation changes for compliance with the process and standards set out in law and either approves or disapproves those regulation changes.
Petition for Writ	The name for the type of appeal filed in Superior

Of Mandate	Court that a licensee files when the licensee wishes to challenge a license disciplinary decision.
Pro Rata Share	Usually, a board's share of costs for certain services, usually determined by a proportional, mathematical formula.
Regulation	A standard that implements, interprets or makes specific a statute enacted by a state agency. It is enforceable the same way as a statute.
Stipulation	A form of plea bargaining in which a disciplinary case is settled by negotiated agreement prior to a hearing.
Statute	A law passed by the Legislature.
TRO	Temporary Restraining Order—an order issued by a Superior Court judge to immediately halt practice.



DESCRIPTIONS OF THE DEPARTMENT OF CONSUMER AFFAIRS' BOARDS, COMMITTEES, & COMMISSION

<i>Board/Committee Commission</i>	<i>Description</i>
Board of Accountancy (15) <i>8 - public</i>	<p>The Board's legal mandate is to regulate the accounting profession for the public interest by establishing and maintaining entry standards of qualification and conduct within the accounting profession, primarily through its authority to license.</p>
Acupuncture Board (7) <i>4 - public</i>	<p>Acupuncture is a theory and method for treatment of illness and disability and for strengthening and invigorating the body. The Board is to protect and educate the public through appropriate regulation of licensure, education standards, and enforcement of the Acupuncture Licensure Act, which includes Oriental Medicine.</p>
California Architects Board (10) <i>5 - public</i> (Landscape Architects Program)	<p>The Board protects the public health, safety, and welfare through the regulation of the practice of architecture and landscape architecture services by ensuring all licensees meet the required threshold of competency and that those who engage in fraudulent business practices are disciplined.</p>
Automotive Repair, Bureau of – Inspection & Maintenance Review Committee (13) <i>3 - public</i>	<p>The Advisory Committee reviews and evaluates the vehicle inspection and maintenance program and recommends program improvements to the Administration and the Legislature in a timely manner.</p>

Board of Barbering and Cosmetology (9) <i>5 – Public</i>	The Board protects the public health, safety, and welfare of the public by regulating, licensing, and disciplinary functions of the profession of barbering and cosmetology. The Board regulates barbers, cosmetologists, estheticians, manicurists, and electrologists.
Board of Behavioral Sciences (11) <i>6 – public</i>	The Board regulates marriage, family, and child counselors; licensed clinical social workers; licensed educational psychologists; and associate clinical social workers.
Contractors State License Board (15) <i>10 – public</i>	The Board protects consumers by regulating the construction industry through policies that promote the health, safety, and general welfare of the public in matters relating to construction.
Court Reporters Board (5) <i>3 – public</i>	The Board protects consumers of court reporting services by establishing and maintaining high qualifications, performance, and ethical behavior standards for Court Reporters.
Dental Board (14) <i>4 – public</i>	The Board protects consumers of dental services in California, administers a licensure examination that thoroughly tests graduates' fitness to safely practice dentistry, and enforces the laws and standards governing the practice of dentistry.
Committee on Dental Auxiliaries (COMDA) (9) <i>1 – public</i> (all Governor appointees)	The Committee administers the examination, qualification, and licensing processes related to four main license classifications of dental auxiliaries for the Board.
Board of Professional Engineers and Land Surveyors (13) <i>7 – public</i>	The Board safeguards the life, health, property, and public welfare by regulating the practice of professional engineering and professional land surveying.

Board of Geologists and Geophysicists (7) <i>4 – public</i>	The Board protects the health, safety, and welfare of the public by examining and licensing geologists and geophysicists and certifying engineering geologists and hydrogeologists in California.
Board of Guide Dogs for the Blind (7) <i>7 – public</i> (all Governor appointees)	The Board is responsible for regulation of guide dog schools, instructors, and fundraising.
Hearing Aid Dispensers Advisory Committee (7) <i>4 – public</i>	The Committee protects hearing-impaired citizens from fraudulent or incompetent fitting and selling of hearing aids; prepares, administers, and grades an examination to evaluate competence; and enforces the Hearing Aid Dispensers Licensing Law.
Landscape Architects Program (5)	See the California Architects Board.
Medical Board (21) <i>9 – public</i>	The Board protects consumers through proper licensing of physicians and surgeons and certain allied health professions and through the vigorous, objective enforcement of the Medical Practice Act.
Naturopathic Medicine (9) <i>3 – public</i>	Senate Bill (SB 907) (Statutes of 2003) established the Bureau of Naturopathic Medicine within the Department of Consumer Affairs. The Bureau will administer the Naturopathic Doctors Act. This law specifies various standards for the licensure and regulation of naturopathic medicine that the Bureau will enforce. Naturopathic medicine is a distinct and comprehensive system of primary health care practiced by a naturopathic doctor for the diagnosis, treatment, and prevention of human health conditions, injuries, and disease.
Board of Occupational Therapy (7) <i>3 – public</i>	The Board serves the public by protecting the health, safety, and welfare of the people of California by ensuring that occupational therapy is provided by qualified, competent occupational therapists and their support personnel. The Board is responsible for the licensure and regulation of occupational therapists and occupational therapist assistants.

Board of Optometry (11) <i>5 – public</i>	The Board administers the Optometry Practice Act, conducting licensing examinations; issuing licenses for the practice of optometry, and issuing fictitious name permits, as well as statement of licensure.
Osteopathic Medical Board (7) <i>2 – public</i> (all Governor appointees)	Established by the Osteopathic Act, the Board protects the health, welfare and safety of California consumers by licensure, and administering continuing education standards of the osteopathic physician and surgeon, as defined in the Osteopathic Initiative Act.
Board of Pharmacy (11) <i>4 – public</i>	The Board serves the public by protecting the health, safety, and welfare of the people of California by ensuring the highest quality of affordable pharmacist's care by qualified pharmacists who adhere to state and federal requirements of practice.
Physical Therapy Board (7) <i>3 – public</i>	The Board protects the consumer by administering and enforcing the Physical Therapy Practice Act and by ensuring that physical therapy is provided by qualified, competent physical therapists and their supportive personnel.
Physician Assistant Committee (9) <i>4 – public</i>	The Committee protects consumers by licensing physician assistants, processing applications for approval of supervising physicians, and approving physician assistant training program.
Board of Podiatric Medicine (7) <i>3 – public</i>	The Board is the unit of the Medical Board that protects consumers by licensing, setting education standards and approving schools and postgraduate programs, and enforcing the Medical Practice Act in regards to Podiatric medical doctors.
Board of Psychology (9) <i>4 – public</i>	The Board protects the health, safety, and welfare of consumers of psychological services through licensure, consumer education, and dissemination of regulatory information.
Board of Registered Nursing (9) <i>3 – public</i>	The Board acts as an advocate for health care consumers by setting and enforcing safe nursing practice standards and by educating the public.

Respiratory Care Board (9) <i>4 – public</i>	The Board protects and serves the consumer by administering and enforcing the Respiratory Care Practice Act and its regulations in the interest of the safe practice of respiratory care.
Security & Investigative Services, Bureau of	The Bureau license private patrol operators, private investigators, alarm company operators, repossession agencies, and locksmiths, and certifies their training facilities and instructors.
Speech-Language Pathology & Audiology Board (9) <i>3 – public</i>	The Board protects the public health, safety, and welfare through the appropriate regulation of the practices of speech-language pathology and audiology.
Structural Pest Control Board (7) <i>4 – public</i>	The Board examines, licenses, and regulates persons practicing structural pest control and ensures that they have the necessary skills and knowledge to properly inspect structures.
Veterinary Medical Board (7) (Registered Veterinary Technician Committee) <i>3 – public</i>	The Board regulates the practice of veterinary medicine through licensing, examination, and enforcement of the rules and regulations governing veterinary medicine. The Committee is mandated to ensure the competency of registered veterinary technicians through examination, and inspect and approve all private schools or institutions that train veterinary technicians.
Board of Vocational Nursing & Psychiatric Technicians (11) <i>6 – public</i>	The mission of the Board is to protect the public's health, safety, and welfare by ensuring that only qualified persons become licensed vocational nurses and psychiatric technicians and that required education, competency, and practice standards are established and enforced.

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Policy # EEO 99-01	Effective date 9/28/99	Issue date 9/28/99	Current status Active
Distribute to All DCA Employees & Executive Officers, Bureau, Program, Policy & Division Chiefs	Approved by _____ Title _____		
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Purpose The purpose of the discrimination complaint procedures is to provide all DCA employees and applicants for employment with a uniform method to raise allegations and complaints of discrimination. The procedures are intended to resolve complaints at the lowest possible organizational level, while assuring that such allegations and complaints receive full consideration and appropriate remedy as applicable, without fear of reprisal or retaliation. These procedures for resolving discrimination complaints shall be adopted by all Boards, Bureaus, Divisions, Programs and Commissions.

Complaints of discrimination, which the Department has authority to investigate, must allege that the complainant was discriminated against on the basis of age, race, sex (including sexual harassment), ancestry, color, religion, disability, national origin, marital status, political affiliation or opinion, sexual orientation, pregnancy, or retaliation. (See the attachment entitled "Basis of Discrimination").

Applicability All employees, including Executive Officers, Bureau, Program, Policy and Division Chiefs.

Policy It is the policy of the Department of Consumer Affairs (DCA) to enforce and promote all laws, rules and regulations prohibiting discrimination based on age, race, sex (including sexual harassment), ancestry, color, religion, sexual orientation, pregnancy, or such other classifications as may be provided specific protection in employment by California or United States Statute. All Departmental policies and practices in employment, development, advancement and treatment of its employees must be free of unlawful discriminatory practices.

Authority State and Federal laws mandate that employees have the right to work in an environment that is free from all forms of discrimination. The key legal mandates are referenced below:

Title VII of the Civil Rights Act of 1964
Government Code Sections 19700-19706
Government Code Section 12940

Age Discrimination Acts of 1967 and 1978
Pregnancy Discrimination Act of 1978
Americans with Disabilities Act of 1990
Federal Rehabilitation Act of 1973
Equal Pay Act of 1963
California Executive Order B-54-79
Labor Code Section 1102.1 (2), Sections 1101 and 1102

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Provisions **ROLES AND RESPONSIBILITIES:**

Equal Employment Opportunity (EEO) Manager

The EEO Manager is responsible for providing leadership in resolving informal and formal complaints of discrimination by working with managers and supervisors, providing EEO counseling, and investigating complaints as necessary. He/she must determine if the Department has jurisdiction: The legal power to act on a complaint in order to investigate it or attempt resolution.

A complaint can be received formally or informally, directly from the complainant, with or without the supervisor's knowledge. It can be forwarded by a supervisor after initial review or it can be brought to the attention of the EEO Manager by a third party.

The EEO Manager is responsible for developing and implementing a plan to resolve each individual complaint. The plan can include 1) EEO counseling, 2) informal complaint resolution procedures, and/or 3) procedures for formal complaint investigation and findings.

Managers and Supervisors

It is the managers/supervisors' responsibility to:

promote a discrimination-free work environment, and take appropriate action to prevent or stop any and all forms of discrimination, including sexual harassment;
ensure that all employees are informed of the Department's discrimination complaint process prior to the need to know, and again if a complaint is brought forth;
ensure that subordinate managers/supervisors and employees attend training as a preventive measure, and to sensitize them to conduct and/or behavior that constitutes discrimination and the consequences of such actions.

When a discrimination complaint is filed (formally or informally) or brought to the managers/supervisors' attention, it is the managers'/supervisors' responsibility to:

Listen to the complainant and take the complaint seriously (employees should not be discouraged from reporting such complaints);

Provide the complainant with a copy of the Statement of Rights (Form 99K-70, attached);

Contact the EEO Office immediately. The EEO Manager will provide assistance to resolve the issue informally or determine if other action is necessary;

Record and document the complaint and perform an immediate preliminary investigation to determine the validity of the complaint;

Provide a copy of the preliminary investigation report to the EEO Office regardless of the findings;

In conjunction with the EEO Office, initiate appropriate and immediate action against the respondent where discrimination is found;

Ensure that the complainant is made aware of the actions taken against the respondent (within guidelines of the Information Practices Act) to give the victim a sense of redress;

Protect the employee(s) complaining of discrimination or sexual harassment from any reprisal or retaliation.

EMPLOYEES

An employee who perceives the comments, gestures, or actions of another employee, supervisor or manager to be discriminatory and offensive should immediately communicate to that person that such behavior is not appropriate and/or is unwelcome. Employees who feel threatened or have difficulty expressing disapproval may seek informal assistance from the EEO Office. Failure to confront the harasser, however, does not interfere with the employee's rights to file a discrimination complaint.

an employee who believes he/she has incurred discrimination or witnessed discrimination has the responsibility to report it to the appropriate supervisor or the EEO Office and to provide all relevant information in a manner that allows the Department the best opportunity to resolve the complaint at the lowest level possible.

An employee or applicant for employment may file a discrimination complaint informally, formally, or externally. The complainant decides which level or type of complaint to file. He/she may contact the EEO Office at any time to consult with staff to determine if his/her concerns constitute discrimination.

PROCEDURES FOR RESOLVING DISCRIMINATION COMPLAINTS

The stages of the discrimination complaint process are described below. Before discussing them, however, there are several points that should be highlighted.

The identification of qualified and capable persons to serve as equal Employment Opportunity Counselors and Investigators is critical to the success of DCA's discrimination complaint process. It is the responsibility of the EEO Manager to see that persons selected to these positions (if they are not already part of the EEO Office staff) are knowledgeable, empathetic, flexible and resourceful people who can diplomatically correct misunderstandings and help forge stronger relationships between people working in the same work environment. He/she must maintain the employees' concerns in the strictest confidence.

Those who conduct investigations must maintain the role of fact finder. His/her responsibility is to assemble enough information to provide a basis for deciding whether the action was or was not discriminatory. Therefore, he/she should never act in such a way as to leave an impression of personal interest in the outcome of the investigation. The EEO Counselor should also avoid becoming the intermediary between the complainant and the Department in any efforts on their part in seeking a resolution of the complaint during an investigation. The importance of neutrality cannot be overemphasized. The EEO Investigator must not communicate any personal judgement or opinion on the merits of any complaint he/she investigates.

The Department has two levels for raising concerns of possible discrimination: an informal process using trained EEO Counselors and a formal process using trained EEO

Investigators. Employees are urged to resolve complaints on an informal process and file a complaint of discrimination directly through the formal process.

INFORMAL COMPLAINT PROCESS

To initiate an informal complaint of discrimination, an employee or job applicant may:

Contact the EEO Office at (916) 322-9861 and request a referral to an EEO Counselor; or Complete a Discrimination Complaint Form (99K-60, attached) designating Informal and submitting it to the EEO Office. The EEO Manager will review the complaint to determine whether or not the allegations fall within the EEO Office jurisdiction, and, if merited, will assign the case to an EEO Counselor.

The EEO Counselor will:

provide the complainant with a copy of the Statement of Rights (Form 99K-70);
discuss the complaint with the complainant and the appropriate Office Manager/supervisor or Executive Officer or Bureau/Division Chief, where appropriate, to assess whether the issues can be resolved within thirty (30) days;
conduct a preliminary investigation;
determine whether informal resolution is the most appropriate means to resolve the issues;
propose a course of action and discuss the proposal with the complainant and other parties involved to determine if the resolution is acceptable and can be accomplished within 30 days;
if the complaint is resolved to the complainant's satisfaction, provide the complainant and management with a confirmation of informal complaint resolution on the actions that have or will be taken to resolve the issues; inform the complainant of appeal rights and plans for future monitoring;
if the complaint cannot be resolved within 30 days on an informal basis, the complainant will be advised of the right to file a formal complaint.

FORMAL COMPLAINT

To file a formal complaint of discrimination, a Discrimination Complaint Form (99K-60) must be completed, designated Formal, and submitted to the EEO Office.

The EEO Manager will:

review the complaint to determine whether the allegations fall within the EEO Office's jurisdiction.
if merited, notify the complainant in writing that the complaint will be investigated and provide the complainant with a Statement of Rights (Form 99K-70); or
if outside the jurisdiction of the EEO Office, direct the employee to the appropriate process for resolution of his/her issue. This may include referral to the Personnel Office, the complainant's supervisor, the Return-to-Work Coordinator, the Labor Relations Office, etc.

The EEO Investigator will:

investigate all aspects of the complaint.
prepare and submit a report of findings to the EEO Manager.

The EEO Manager will:

evaluate the evidence and make a determination on the allegation(s).

submit the report with recommendations for resolution to the Director for review and approval.
notify the complainant and the respondent of the findings.
notify management, where appropriate, of the findings and proposed action.
as necessary, work with the Legal Office to carry out measures to make the complainant whole or to carry out adverse action(s).
work with management and supervisors to implement corrective measures.

ADDITIONAL INFORMATION:

ACCESS TO RECORDS

The EEO Office shall have access to all information deemed necessary to determine the validity of the complaint in both the informal and formal stages of the process. The cooperation and assistance of all employees, supervisors and managers involved is required. If an employee of the Department refuses or threatens to refuse to cooperate in an investigation, the State Personnel Board (SPB) may directly investigate or hear the complaint. Subpoenas or any other action deemed appropriate will be used to effect the purpose of the investigation.

APPEAL PROCESS

A complainant who is not satisfied with the Department's decision may file an appeal with the Executive Officer of the SPB within thirty (30) days from the date of receipt of the Department's decision, in accordance with Article 4, Rules 51.2 and 547.1 of the SPB Regulations.

A complaint that is not resolved by the Department within 180 days from the date of formal filing with the Department, may be referred to the State Personnel Board as an appeal for remedial action.

CONFIDENTIALITY

Generally, all discussions with a complainant are confidential and resolution will not be pursued without the concurrence of the complainant. However, when the issues are serious in nature (sexual harassment) or involve potential criminal activity, (abuse, rape, property damage) the EEO Manager or the EEO Counselor must advise the complainant that the information provided must be referred to the appropriate authority in order to remedy the conduct of the offending party. In addition, once the complainant requests resolution, confidentiality may no longer be assured.

When a complaint becomes formal, confidentiality provisions do not apply. Persons charged with discriminatory practices will be informed of the charge and allowed to respond once an investigation is initiated. Information gathered during the investigation regarding the complainant or charged party(s) will be kept confidential to the extent possible.

Persons interviewed during an investigation shall be informed that their comments will remain confidential unless the information is to be used for a basis for action. In these cases the information may be presented in a public forum.

Involved participants will be informed that Federal and State EEO regulatory agencies require a report on both formal and informal discrimination complaints filed with the Department. the identity of the complainant and other involved persons may be released to those agencies.

PARALLEL REVIEW

the discrimination complaint procedure is separate and distinct from employee grievance procedures. an employee will not be allowed a parallel review under both the employee grievance and discrimination complaint procedures.

Complaints or issues that do not allege discrimination are handled through the employee grievance procedure or other applicable processes. The Personnel and Labor Relations Offices could be involved.

The grievance procedure is used to address terms and conditions of employment such as working hours, out of class claims, overtime requirements, etc.

If a grievance is found to meet the discrimination complaint criteria, the grievance process will cease at that point and the matter will be referred to the EEO Office.

If during the course of the DCA discrimination complaint investigation, a rejection during probation or an adverse action appeal is filed with the SPB and the employee alleges discrimination, the Department will suspend its investigation and the complaint will be examined and adjudicated by the SPB.

RELEASE TIME

The complainant may use a reasonable amount of State time based on the complexity and sensitivity of the issues, as determined by the EEO Manager, to discuss the complaint with a certified EEO Counselor or an EEO Investigator.

RETALIATION AND INTIMIDATION

No person shall intimidate, threaten, coerce, or discriminate against any individual because he/she; 1) opposed an employment practice made unlawful by the laws (Federal and State) prohibiting employment discrimination; or 2) made a complaint or testified, assisted, or participated in any manner in any investigation, proceeding, or hearing regarding a discrimination complaint.

RIGHT TO REPRESENTATION

The complainant has the right to representation at each step of the process by a person of his/her choosing.

TIME LINES

Filing Complaints

An employee or applicant has the right to file a discrimination complaint immediately after such incident occurs and has up to three hundred sixty-five (365) calendar days to file the complaint. This period may be extended up to 90 days if a person allegedly aggrieved by the discrimination first obtained knowledge of the facts after the expiration of the one-year period.

A Discrimination Complaint Form (99K-60) must be completed by the complainant, indicating whether the complainant wants to file an informal or formal complaint.

The time requirement for filing a discrimination complaint is in conformity with all other Federal and State statutes and policies. However, both the Department of Fair Employment and Housing and the Federal Equal Employment Opportunity Commission Title VII guidelines do not allow the additional 90-day exception provided under the SPB administered process.

RESPONDING TO COMPLAINTS

Upon receipt of a Discrimination Complaint Form (99K-60), the EEO Office will review the complaint and notify the complainant within ten(10) days whether the allegations(s) meets the criteria to be handled through the discrimination complaint procedure.

In accordance with the Department of Consumer Affairs stated process, the Department has one hundred eighty (180) calendar days from the date the complaint is filed to issue a final decision on a formal discrimination complaint. This time frame may be extended upon mutual written agreement with the EEO Manager and the complainant.

The Department has thirty (30) days to resolve an informal discrimination complaint. If the complaint cannot be resolved in 30 days, the complaint will be handled formally unless the complainant and the EEO Manager have agreed to extend that period.

EXTERNAL COMPLIANCE

EXTERNAL COMPLIANCE AGENCIES

The department discrimination complaint procedures are not intended to prohibit employees from filing a charge of discrimination with the State Personnel Board (SPB), the Equal Employment Opportunity Commission (EEOC), the Department of Fair Employment and Housing (DFEH), and/or the Division of Labor Standards Enforcement (DLSE), Department of Industrial Relations. Employees are not required to exhaust the administrative procedure to file a formal discrimination complaint prior to exercising their right to file with an outside compliance agency.

The SPB will accept direct jurisdiction of a discrimination complaint under the following four circumstances:

When the complainant is alleging discrimination based upon retaliation;

When the circumstances directly involve a high level administrator of the Department; or

When the Department has exceeded its 180-day requirement to respond to the complaint.

The EEOC and DFEH maintain separate jurisdiction over discrimination complaints filed by State civil service employees. By mutual agreement, both EEOC and DFEH will cross-file discrimination complaints between each agency; thus the agency initially receiving the complaint will automatically cross-file with the other agency.

The Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE) handles complaints of discrimination on the basis of sexual orientation.

PROCESS

The external agency makes it a practice to notify the Department that a complaint has been filed and may request information pertaining to the complaint. Commonly EEOC, DFEH, and SPB will file a notice with the Department's Equal Employment Opportunity Office, advising that a complaint has been filed and requesting a position statement on the charges filed.

Should the notice of filing be received at the Board/Bureau/Division, a copy of the notice should immediately be forwarded to the EEO Office for response.

The EEO Office is responsible for providing a response to the outside compliance agency. The EEO Office sends a request to the appropriate Executive Officer, Division/Policy Chief with a copy of the charges filed. The Board/Bureau/Division is requested to provide the needed information within two weeks.

Because the complaint filed with an outside compliance agency in essence names the Department itself as "respondent", the information contained in the complaint should be maintained as sensitive in nature. Those persons directly named in a charge filed with an outside compliance agency are notified directly by the compliance agency.

All files will be maintained and monitored by the EEO Office. The EEO Office will be responsible for making any determination of case file information release. Any request for information contained in a discrimination complaint investigative file needs to be referred to the EEO Office.

Attachments:

Basis of Discrimination

Discrimination Complaint Process Flowchart

Discrimination Complaint Form (99K-60)

Statement of Rights Form (99K-70)

Acknowledgement of Receipt and Understanding of Discrimination Policy and Complaint Procedures

Revisions

Determination of the need for revision of this policy is the responsibility of the Chief, Equal Employment Opportunity Office (EEO). Questions about the status or maintenance of this policy should be directed to the Policy, Research and Planning Division at (916) 322-3525. Questions about Discriminator Policy Complaint Procedures should be directed to the EEO At (916) 322-9861 or to the EEO hotline at (888) 226-5001.

Related documents

Basis of Discrimination

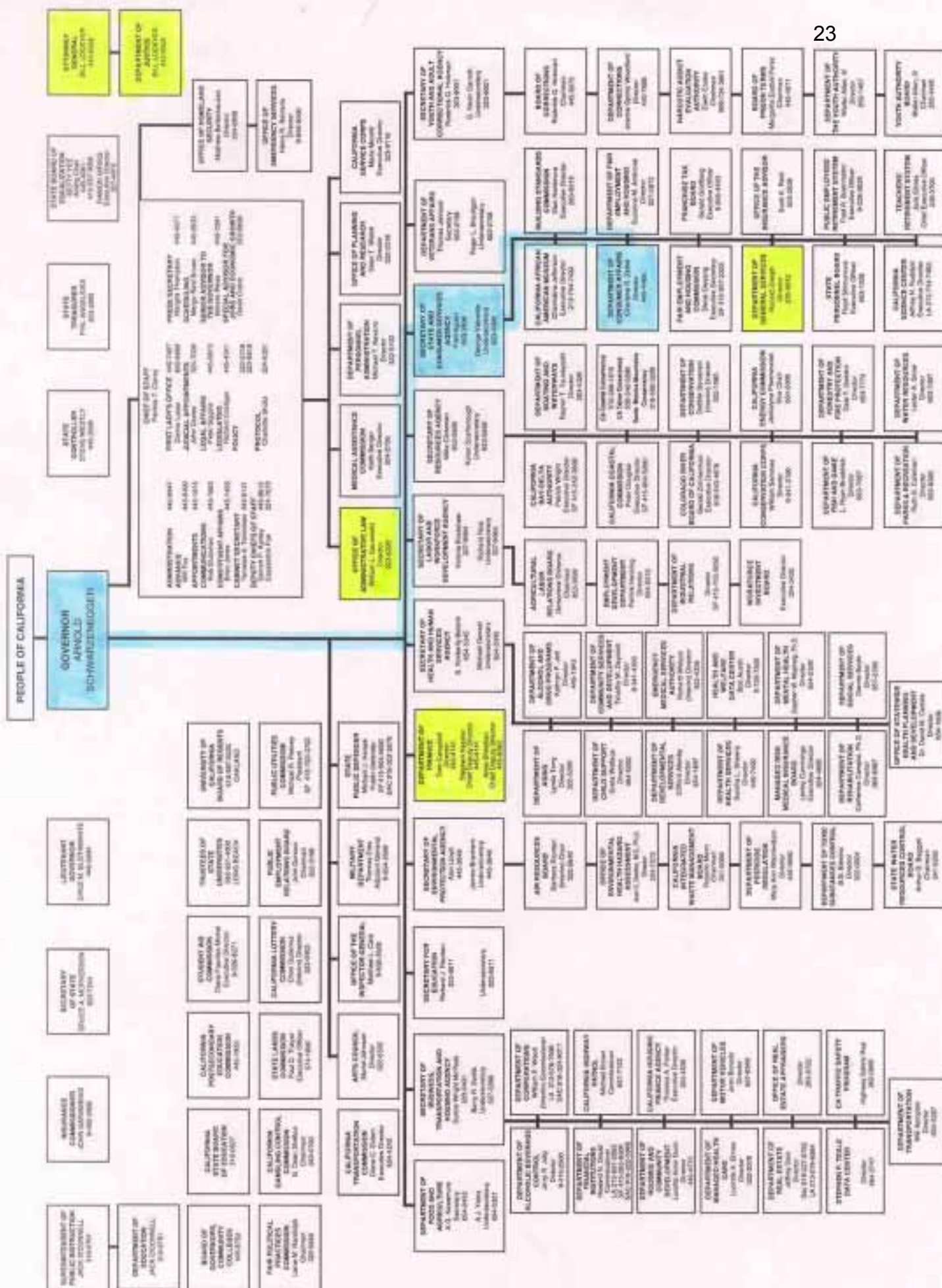
Discrimination Complaint Process Flowchart

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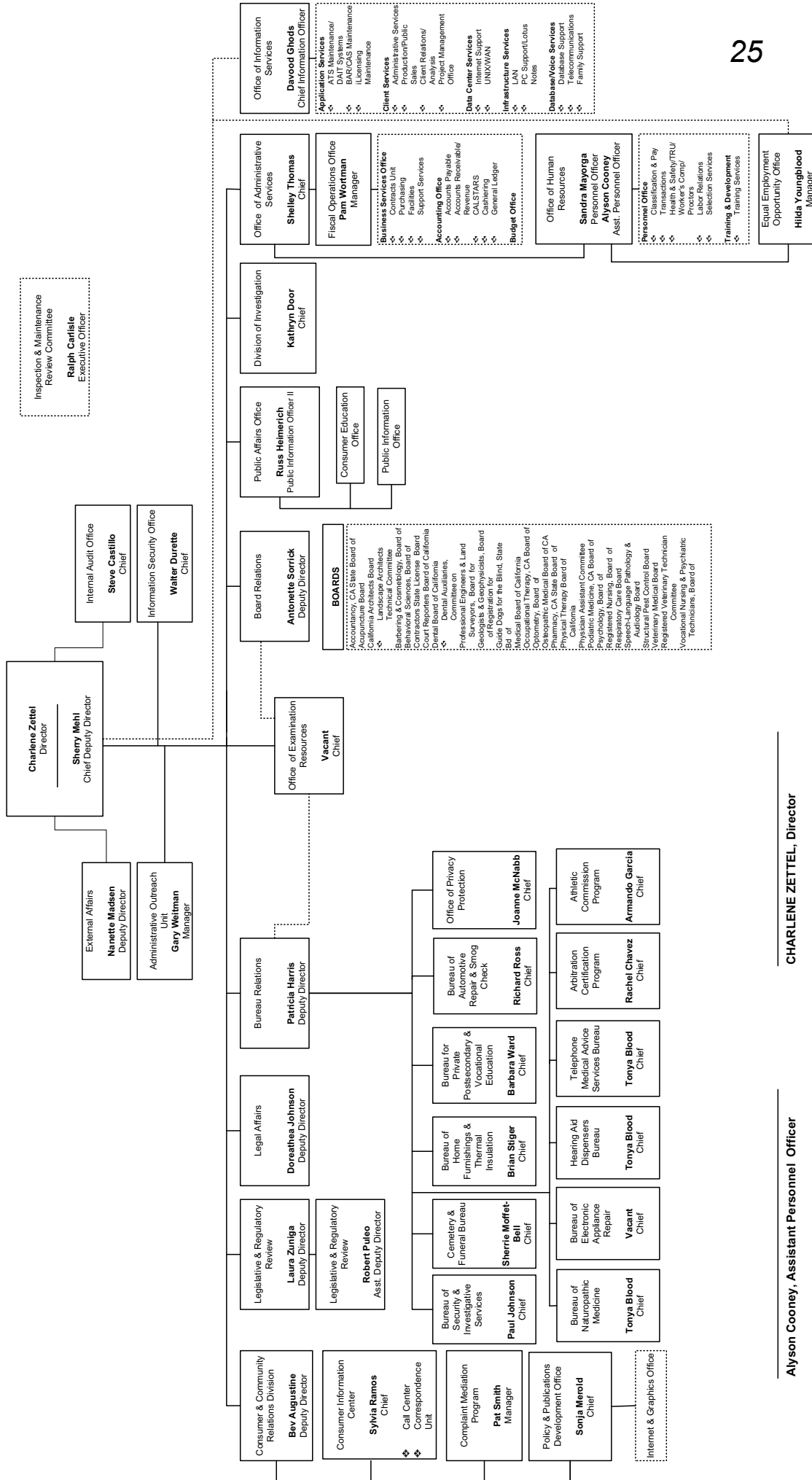
Statement of Rights Form (99K-70)

Acknowledgement of Receipt and Understanding of Discrimination Policy and Complaint Procedures

CALIFORNIA STATE GOVERNMENT • THE EXECUTIVE BRANCH



DEPARTMENT OF CONSUMER AFFAIRS



State of California

Department of Consumer Affairs

"To protect and serve consumers while ensuring a competent and fair marketplace."

Strategic Plan

March 1, 2005



Arnold Schwarzenegger, Governor
State of California

Fred Aguiar, Secretary
State and Consumer Services Agency

Charlene Zettel, Director
Department of Consumer Affairs

**California Department of Consumer Affairs
Strategic Plan
March 1, 2005**

Our Mission:

To protect and serve consumers while ensuring a competent and fair marketplace.

Our Vision:

To be the recognized leader in providing innovative services that educate and empower consumers to make informed decisions. Consumers, licensees and businesses will have a safe, fair, and competitive marketplace.

Our Values:

As a government agency dedicated to protecting consumers and regulating a variety of professions, occupations and businesses, the success and effectiveness of the Department of Consumer Affairs (DCA) depends on:

- Serving our stakeholders with committed, knowledgeable, well-trained employees.
- Providing prompt and fair investigation and adjudication of violations of law.
- Educating consumers so they are capable of making informed decisions in a complex and changing marketplace.
- Licensing applicants to ensure job markets are easily accessible.
- Creating productive partnerships with consumers, licensees, and businesses.
- Developing automation systems that provide efficient and effective support to consumers, DCA employees, licensees, and businesses.
- Improving consumer access to critical health and safety information and educate them on the health benefits of clean air.

Goals and Objectives:

The Department of Consumer Affairs has adopted the following strategic goals for 2005. As part of the ongoing planning and monitoring process, the stated goals will be reevaluated and adjusted, as necessary, to meet business needs.

Goal One:

Empower consumers to make informed decisions about the marketplace

- 1.1 Conduct a baseline assessment of consumer awareness levels and issues, identify target audiences, and develop and distribute information and outreach material to targeted audiences, with particular emphasis on under-served and non-English speaking populations.
 - 1.2 Ensure DCA's Consumer Information Center is appropriately staffed during peak call days and hours.
 - 1.3 Establish an advisory committee of stakeholders to make recommendations for enhancing the ease of use of DCA's website.
 - 1.4 Create a committee within DCA to make recommendations for improving departmental publications, including: continual updating of publications, developing more effective distribution and inventory methods, and ensuring that all DCA entities are informed of the changes.
 - 1.5 Institute a DCA on-line newsletter that informs consumers on relevant marketplace issues.
 - 1.6 Ensure consumers have access to information on how to best protect their personal information and right to privacy.
-

Goal Two:

Develop a highly productive and well-informed workforce

- 2.1 Conduct a formal training needs assessment for all DCA employees and develop a training program based on those results.
- 2.2 Train DCA management on techniques and processes for evaluating staff performance.
- 2.3 Institute an internal DCA on-line newsletter to keep employees informed of departmental issues.

2.4 Establish town hall meetings conducted by the Executive Office for all DCA employees and managers.

2.5 Create an employee incentive and recognition program.

Goal Three:

Develop an organizational structure and processes that deliver responsive, effective, and innovative services

3.1 Establish training classes or seminars for clients of DCA's centralized administrative services (e.g. Legal Office, Administrative Services, Legislative and Regulatory Review) to educate appropriate staff on the latest trends and practices on issues of interest.

3.2 Support DCA's boards and bureaus in providing quality, effective, and cost-efficient services to internal and external stakeholders through the creation of performance improvement teams.

3.3 Establish a system to evaluate, on an ongoing basis, the quality of services provided to internal users of DCA's centralized services.

3.4 Develop a workforce and succession plan to ensure that DCA has adequate staffing and skill levels in response to employee retirement and attrition.

Goal Four:

Develop and maintain partnerships with public and private organizations that share common interests

4.1 Identify and partner with federal, state, and local government agencies; business and trade associations; and public interest groups to coordinate and advance similar goals and objectives. Establish liaisons and forums to communicate issues of mutual concerns.

Goal Five:

Enhance licensing processes and outcomes

5.1 Review and improve existing application processes to ensure the timely, efficient, and accurate processing of all applications.

- 5.2 Expand on-line licensing and renewals to all regulatory programs and license types.
- 5.3 Ensure all licensing examinations and resulting decisions are valid.
- 5.4 Explore options for consolidating similar licensing types to minimize the number of licensing categories.

Goal Six:

Enhance enforcement processes and outcomes

- 6.1 Review and enhance both manual and online complaint intake and referral processes.
- 6.2 Develop uniform guidelines for prioritizing consumer complaints.
- 6.3 Review and evaluate the effectiveness of the Division of Investigation's services.
- 6.4 Evaluate alternative options for pursuing administrative and criminal sanctions against licensees and registrants.
- 6.5 Develop guidelines to educate licensees about current standards of practice.
- 6.6 Increase public awareness of board and bureau enforcement actions through the appropriate media and other outreach programs.

Goal Seven:

***Leverage existing and emerging technologies
to support the Department's business goals and objectives***

- 7.1 Develop and establish an online, one-stop shop for all information, forms and applications for consumers, businesses, applicants and licensees.
- 7.2 Establish an Information Technology Governance Council to develop DCA information technology policies and coordinate initiatives.
- 7.3 Create a pilot program to automate a business process that enhances the delivery of a centralized service provided by DCA to its boards and bureaus.

- 7.4 Automate fee transactions to allow for the acceptance of electronic funds transfers.
- 7.5 Enhance the data reporting capabilities of the Consumer Affairs System.
- 7.6 Establish an integrated web-based licensing and enforcement system that houses all licensing and enforcement information, regardless of the board or bureau.
- 7.7 Expand the Applicant Tracking System to all interested boards and bureaus.

Goal Eight:

Improve consumer access to critical health and safety information, including the health consequences of air pollution

- 8.1 Develop DCA as a resource on critical health and safety issues impacting consumers.
- 8.2 Distribute information to consumers regarding the clean air health benefits derived from the Smog Check Program.
- 8.3 Enhance consumer participation in programs that help reduce motor vehicle emissions.

Our Stakeholders - Their Needs and Wants:

The success of DCA's ability to effectively implement its mission depends on a clear understanding of the needs of our stakeholders. Our stakeholders include:

- Consumers, who seek accurate and timely information on marketplace trends, practices and protection from unscrupulous business practices.
- Licensees, who seek expeditious and accurate services, fair administration of the law, and timely and accurate communication on issues of interest to them.
- Applicants for licensure, who seek expeditious and accurate services, fair administration of the application process, and timely and accurate communication on issues of concern.
- Employees of DCA, who seek clear direction, recognition by management, and training programs to better serve our stakeholders and grow professionally.
- DCA boards and bureaus, which seek open communication, the efficient delivery of services from DCA, and a timely response to issues of concern.

- Other state agencies, which seek accurate and timely information to make informed decisions.
- The Legislature, which seeks timely action on issues of concern, accountability, and demonstrated effectiveness and relevancy concerning the professions and businesses regulated by DCA.
- The business community, which seeks a fair marketplace, fairness and consistency in the administration of the law, and responsiveness from DCA when changes occur in the marketplace.

Environmental Scan:

The ability of DCA to create and properly execute its mission, as contained in this strategic plan, required an analysis of key external forces that influence the way DCA functions. Some of these external forces include:

- Fiscal Challenges – Government must do the best job possible with the resources available. It also means that, to the extent possible, DCA shall adopt the best practices from the public and private sectors.
- Changes in Technology – Technology is constantly evolving and changing. Properly implemented, technology can serve as a powerful tool by improving communication with stakeholders, eliminate paperwork, and enhance employee productivity.
- Business and the Economy – As an agency that licenses and registers 2.3 million people in a variety of businesses and professions, the business community expects DCA to communicate with and educate licensees and registrants, operate expeditiously and efficiently, and partner with them to protect California consumers.
- Changing Demographics – California's population is increasing, aging and the diversity of its people grows every day. The public also demands more service, more information, and the speedy resolution of issues facing them.

Sunset Review Process Allows for the Regular Evaluation of DCA Boards and Bureaus

The sunset review process provides an opportunity to conduct a regular systematic performance review and evaluation of DCA boards and bureaus. As mandated by SB 2036 (McCorquodale, Chapter 908, Statutes of 1994), the sunset review process provides a formal mechanism for the Legislature, the boards and bureaus, interested parties and stakeholders, and the Department to make advisory recommendations for board and bureau improvements on a standard four-year cycle.

The Department has a significant role in the sunset review process. Specifically, the sunset law mandates the following four distinct duties that require the Department to:

- Provide assistance to the boards and bureaus in preparing their sunset reports
- Provide testimony at the annual sunset hearings
- Review the Joint Committee's findings and recommendations
- Report its own findings and recommendations to the Joint Committee

Consistent with the Consumer Affairs Act and the sunset review law, the sunset review process provides the appropriate forum for the Legislature, the boards and bureaus, interested parties and stakeholders, and the Department to facilitate needed changes.

Sunset Review Focuses on Application Processing and Complaint Handling

The goal of the sunset review process is to improve the quality of services provided to consumers by thoroughly examining a board's operations, including application processing and complaint handling. Specifically, the Legislature, the boards and bureaus, interested parties and stakeholders, and the Department have used the process, which includes an initial review and on-going re-review, to:

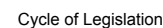
- Ensure that the public's complaints are handled in a courteous and expeditious manner
- Ensure the public is informed about any complaints, disciplinary actions, judgments and criminal actions against a licensed professional
- Establish appropriate performance measures for each board reviewed

Every Aspect of a Board's Operation is Reviewed and Monitored

A questionnaire that asks over 300 questions initiates the sunset review process for each board and bureau. Highlights of specific evaluative questions regarding applications processing, complaint handling, and operational systems include:

- Has the board/bureau specified its vision, mission and goals and objectives for its agency?
- Has the board/bureau been involved in strategic planning, any type of basic self-assessment quality management practices, or reorganization to improve the board's overall effectiveness and efficiency?
- Are there any undue delays in approving an application, providing an exam, or in issuing a license?
- Does the consumer have access to application and licensing information?
- Are complaints handled in both an expeditious and appropriate manner, either through informal or formal processes? Is there any reduction in complaint handling timeframes, or have timeframes increased?
- Is complaint information disclosed to the public?
- How many investigations have been commenced and completed for each year over the past four years, and how many are currently open/pending? What has been the timeframe for these investigations? Has there been a backlog or reductions of outstanding investigation cases?
- Are investigations, inspections and/or audits handled in both an expeditious and appropriate manner by the board/bureau, either through use of their own investigative staff or use of the Department's Division of Investigation? How accurate are the initial and subsequent decisions on investigations?
- Have there been any extreme delays in handling of disciplinary cases over the past four years, which have been referred to the Attorney General's Office for prosecution, and to the Office of Administrative Hearings for a final disposition?
- What disciplinary information is disclosed to the public?

In addition, the initial round of sunset review includes a Consumer Satisfaction Survey, which asks each board and bureau to assess what percentage of consumers are satisfied with the way in which the board handled their complaints.



2006

Jan. 1	Statutes take effect (Art. IV, Sec. 8(c)).
Jan. 4	Legislature reconvenes (J.R. 51(a)(4)).
Jan. 10	Budget must be submitted by Governor (Art. IV, Sec. 12(a)).
Jan. 13	Last day for policy committees to hear and report to Fiscal Committees fiscal bills introduced in their house in 2005 (J.R.61(b)(1)).
Jan. 20	Last day for any committee to hear and report to the Floor bills introduced in their house in 2005 (J.R.61(b)(2)).
Jan. 27	Last day to submit bill requests to the Office of Legislative Counsel.
Jan. 31	Last day for each house to pass bills introduced in 2005 in their house (J.R.61(b)(3)) and (Art. IV, Sec. 10(c)).
Feb. 24	Last day for bills to be introduced (J.R. 54(a)) (J.R. 61(b)(4)).
Apr. 6	Spring Recess begins at end of this day's session (J.R.51(b)(1)).
Apr. 17	Legislature reconvenes (J.R. 51(b)(1)).
Apr. 28	Last day for policy committees to hear and report to Fiscal Committees fiscal bills introduced in their house (J.R.61(b)(5)).
May 12	Last day for policy committees to hear and report non-fiscal bills introduced in their house to Floor (J.R. 61(b)(6)).
May 19	Last day for policy committees to meet prior to June 5 (J.R. 61(b)(7)).
May 26	Last day for Fiscal Committees to hear and report to the Floor bills introduced in their house (J.R. 61(b)(8)).
May 26	Last day for Fiscal Committees to meet prior to June 5 (J.R. 61(b)(9)).
May 30	Through June 2- Floor Session only. No Committee may meet for any purpose. (J.R. 61(a)(10)).
June 2	Last day for bills to be passed out of the house of origin (J.R. 61(b)(11)).
June 5	Committee meetings may resume (J.R. 61(b)(12)).
June 15	Budget must be passed by midnight (Art. IV, Sec. 12(c)).
June 29	Last day for a legislative measure to qualify for the general election (Nov. 7) ballot (Elec. Code Sec. 9040).
June 30	Last day for policy committees to meet and report bills (J.R. 61(b)(13)).
July 7	Summer Recess begins at the end of this day's session if Budget Bill has been enacted (J.R. 51(b)(2)).
Aug. 7	Legislature reconvenes (J.R. 51(b)(2)).
Aug. 18	Last day for Fiscal Committees to meet and report bills to Floor (J.R. 61(b)(14)).
Aug. 21	Through Aug. 31 - Floor session only. No committees, other than the Committee on Rules or conference committees, may meet for any purpose (J.R. 61(b)(15)).
Aug. 25	Last day to amend bills on the Floor (J.R. 61(b)(16)).
Aug. 31	Last day for each house to pass bills (Art. IV, Sec 10(c)) and (J.R. 61(b)(17)).
Aug. 31	Final Recess begins at end of this day's session (J.R. 51(b)(3)).
Sept. 30	Last day for Governor to sign or veto bills passed by the Legislature before Sept. 1 and in his possession on or after Sept. 1 (Art. IV, Sec. 10(b)(2)).
Oct. 2	Bills enacted on or before this date take effect on Jan. 1, 2007 (Art. IV, Sec. 8(c)).
Nov. 30	Adjournment <u>Sine Die</u> midnight (Art. IV, Sec. 3(a)).
Dec. 4	12M Convening of the 2007-08 Regular Session (Art. IV, Sec. 3 (a)).

2007

Jan. 1	Statutes take effect (Art. IV, Sec. 8(c)).
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OVERVIEW OF CALIFORNIA'S LEGISLATIVE PROCESS

The California State Legislature is made up of two houses: the Senate and the Assembly. There are 40 Senators and 80 Assembly Members representing the people of the State of California. The Legislature follows a legislative calendar containing important dates of activities and critical deadlines during its two-year session.

A BILL STARTS AS AN IDEA

All legislation begins as an idea or concept. Ideas and concepts can come from a variety of sources. The process is initiated when a Senator or Assembly member decides to author a bill.

A BILL NEEDS AN AUTHOR

The first step for an author is to send a bill idea to the Legislative Counsel where it is drafted into the actual text of the bill. The draft of the bill is returned to the Legislator for introduction. If the author is a Senator, the bill is introduced in the Senate. If the author is an Assembly Member, the bill is introduced in the Assembly.

A BILL'S FIRST READING/INTRODUCTION

A bill is introduced, or read the first time, when the bill number, the name of the author, and the descriptive title of the bill is read on the floor of the house. The bill is then sent to the Office of State Printing. No bill may be acted upon until 30 days have passed from the date of its introduction.

A BILL'S COMMITTEE HEARING

The bill then goes to the Rules Committee of its house where it is assigned to the appropriate policy committee for its first hearing. Bills are assigned to policy committees according to subject area. For example, a Senate bill dealing with health care facilities would be assigned to the Senate Health and Human Services Committee for policy review. Bills that require the expenditure of State funds must also receive a fiscal hearing by either the Senate Appropriations Committee or Assembly Appropriations Committee. Each house has a number of policy committees, and a bill may be referred to more than one committee (double or triple referral). Each committee is made up of a specified number of Senators or Assembly Members.

During the committee hearing the author presents the bill to the committee, and witnesses provide testimony in support or opposition of the bill. The committee then votes to pass the bill, to pass it as amended, or to defeat it. Bills can be amended several times. This is the stage where letters of support or opposition can be very influential. Letters should be mailed to the author and committee members before the bill is scheduled to be heard in the committee. It takes a majority vote of the committee membership for a bill to be passed.

Each house maintains a schedule of legislative committee hearings known as the Senate and Assembly Daily Files, which are available from the Capitol Bill Room or the Senate and Assembly websites (www.senate.ca.gov and www.assembly.ca.gov). Prior to a bill's hearing, a bill analysis is prepared that explains current law, what the bill is intended to do, and some background information. Typically the analysis also lists organizations that support or oppose the bill.

A BILL'S SECOND AND THIRD READING

A bill passed by committees goes back to the floor in the house of origin and is read a second time. After this, bills are placed on third reading and are eligible for consideration by the full Assembly or Senate (floor vote). Bill Analyses are also prepared prior to third reading. When a bill is read the third time it is explained by the author, discussed by the members and voted on by a roll call vote. Bills that require an appropriation or that take effect immediately, generally require 27 votes in the Senate and 54 votes in the Assembly to be passed. Other bills generally require 21 votes in the Senate and 41 votes in the Assembly. If a bill is defeated, the Member may seek reconsiderations and another vote.

BILL PROCESS IS REPEATED IN THE SECOND HOUSE

Once the bill has been approved by the house of origin it proceeds to the other house (second house) where the procedure is repeated.

DIFFERENT VERSIONS OF A BILL MUST BE RECONCILED

If a bill is amended in the second house, it must go back to the house of origin for concurrence, which is an agreement on the amendments. If an agreement cannot be reached, the bill is referred to a two-house conference committee to resolve such differences. The conference committee is comprised of three members for the Senate and three from the Assembly. If a compromise is reached, the bill is returned in the form of a conference report to both houses for a vote.

GOVERNOR

If both houses approve a bill, it then goes to the Governor. The Governor has three options. The Governor can sign the bill into law, allow it to become a law without his or her signature, or veto it. A governor's veto can be overridden by a two-thirds vote in both houses. Most bills go into effect on the first day of January of the next year. Urgency measures take effect immediately after they are signed or allowed to become law without signature.

CALIFORNIA LAW

Bills that are passed by the Legislature and approved by the Governor are assigned a chapter number by the Secretary of State. These Chaptered Bills (also referred to as Statutes of the year they were enacted) then become part of the California Codes. The California Codes are a comprehensive collection of laws grouped by subject matter.

WHAT IS THE DIFFERENCE BETWEEN A LAW AND A REGULATION, AND WHAT DO THEY MEAN TO MY BOARD?

Like the United States government, the government of California is divided into three separate and distinct branches or departments – the legislative, executive, and judicial. The legislative branch is made up of the Senate and the Assembly whose members are elected by the citizens of the State. The legislature enacts statutes (laws)¹. The executive branch is made up of various agencies (such as the various DCA boards), which carry out the laws. The judicial branch is made up of the court system, including the trials courts, Courts of Appeal, and the California Supreme Court.

The “administrative” or “rulemaking” agencies which comprise the executive branch carry out the laws found in statute by adopting, amending or repealing regulations under the authority granted to them by either statutes or constitutional provisions. The “regulations” interpret or make specific the law that is enforced or administered by a state agency, or the law governing the agency’s procedure.

HOW DOES A BOARD GET A REGULATION THROUGH THE OFFICE OF ADMINISTRATIVE LAW?

Unless the Legislature has created an exemption, agencies must follow the procedures in the Administrative Procedure Act (APA)² when adopting, amending or repealing regulations.

The APA sets forth the procedures that state agencies must follow when adopting regulations. Among other things, the APA requires state agencies to:

- Give public notice
- Receive and consider public comments
- Submit regulations and rulemaking files to the Office of Administrative Law for review to ensure compliance with the requirements of the APA
- Publish the regulations in the California Code of Regulations

The Office of Administrative Law (OAL) is an independent agency within the executive branch. It was created by the Legislature in 1979 to ensure that state agency regulations are authorized by statute, consistent with other law, and written in a comprehensible manner. OAL reviews regulations submitted by agencies; if OAL approves the regulations, they are filed with the Secretary of State and become law.

¹The People of the State may also enact statutes and constitutional provisions.

²Government Code §§ 11340-11359.

SIX LEGAL REVIEW STANDARDS TO PROMULATE A REGULATION

1. NECESSITY

2. AUTHORITY

3. CONSISTENCY

4. CLARITY

5. NONDUPLICATION

6. REFERENCE

OVERVIEW OF THE REGULATION ADOPTION PROCESS

1. IDENTIFY THE PROBLEM

Before the rulemaking process is ever started, you must determine if there is a problem. If so, try to state the problem.

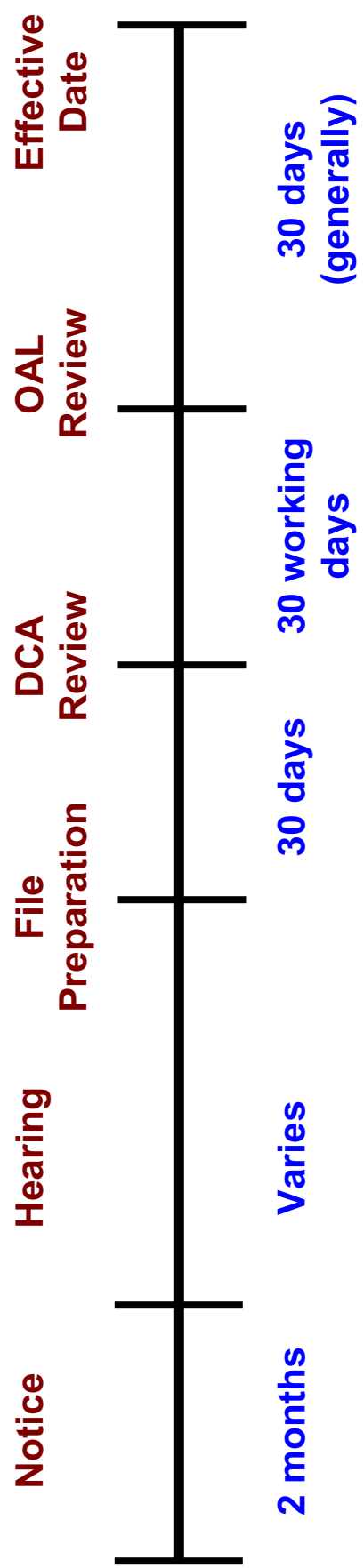
2. SEEK SOLUTIONS

Identify the various solutions through informational hearings, committee meetings, etc., i.e., get input. Pick 1 or 2 solutions. If your solutions require a regulatory change, draft a regulatory proposal.

3. PROCEED WITH THE APA PROCESS

The statutory procedures and time frames for changing regulations are set forth in the Administrative Procedure Act ("APA"). A general time line is set forth below.

Formal Regulatory Process



**BAGLEY-KEENE OPEN MEETING ACT
12 RULES FOR STATE BOARD MEETINGS
(October 2006)**

[NOTE: GC § = Government Code Section; AG = Opinions of the California Attorney General.]

- 1. All meetings are public. (GC §11123.)**
- 2. Meetings require 10 calendar days advance notice—must also be posted on the Internet. (GC §11125(a).)**
- 3. Agenda required—must include a general description of items to be discussed (specific items of business—GC §§ 11125 & 11125.1).**
 - a. No item may be added to the agenda unless it meets emergency criteria. (GC §11125(b).)**
- 4. Meeting is any meeting of a committee of 3 or more persons or any “gathering” of a quorum of the board where board business will be discussed. Includes telephone & e-mail communications. (GC § 11122.5; Stockton Newspapers Inc. v. Members of the Redevelopment Agency of the City of Stockton (1985) 171 Cal.App.3d 95.)**
- 5. Law applies to committees, subcommittees, and task forces that consist of 3 or more persons. (GC §11121)**
- 6. Public comment must be allowed on agenda items before or during discussion of the items and before a vote, unless: (GC §11125.7.)**
 - a. The public was provided an opportunity to comment at a previous committee meeting of the board. If the item has been substantially changed, another opportunity for comment must be provided.**
 - b. The subject matter is appropriate for closed session.**
- 7. Closed sessions (GC §11126.) At least one staff member must be present. (GC § 11126.1).**

Closed session allowed to:

- a. Discuss and vote on disciplinary matters under the Administrative Procedure Act (APA). (subd. (c)(3).)**
- b. Prepare, approve or grade examinations. (subd. (c)(1).)**
- c. Discuss pending litigation. (subd. (e)(1).)**
- d. Discuss appointment, employment, or dismissal of Executive Officer (EO) unless EO requests such action to be held in public. (subd. (a), (b).)**

No closed session allowed for:

- a. Election of board officers. (68 AG 65.)
- b. Discussion of controversial regulations or issues.

- 8. **Emergency Items and Meetings (GC §11125.5.)**
 - a. Work stoppage (subd. (b)(1).)
 - b. Crippling disaster (subd. (b)(2).)
- 9. **Special Meetings (GC § 11125.4.)**
 - a. At least 48 hours notice. (subd.(b).)
 - b. "Pending litigation" (subd.(a)(1).)
 - c. Proposed legislation (subd.(a)(2).)
 - d. Issuance of a legal opinion (subd.(a)(3).)
 - e. Disciplinary action involving state officer or employee (subd.(a)(4).)
 - f. License examinations & applications (subd.(a)(6).)
- 10. **No secret ballots or votes except mail votes on APA enforcement matters. (68 AG 65; GC §11526.)**
- 11. **No proxy votes. (68 AG 65.)**
- 12. **Meetings by teleconferencing (GC §11123.)**
 - a. Suitable audio or video must be audible to those present at designated location(s). (subd. (b)(1)(B).)
 - b. Notice and agenda required. (subd. (b)(1)(A).)
 - c. Every location open to the public and at least one member of board physically present at the specified location. All members must attend at a public location. (subds. (b)(1) (C), and (F).)
 - e. Rollcall vote required. (subd. (b)(1)(D).)
 - f. Emergency meeting closed sessions not allowed. (subd. (b)(1)(E).)

Reference: January 2006 "Public Meetings" Memorandum & Attached Guide to the Bagley-Keene Open Meeting Act
http://www.dca.ca.gov/r_r/bagleykeene_meetingact.pdf



CALIFORNIA DEPARTMENT OF CONSUMER AFFAIRS
DIVISION OF LEGAL AFFAIRS
1625 NORTH MARKET BLVD., SUITE S-309
SACRAMENTO, CA 95834



Memorandum

To: EXECUTIVE OFFICERS
EXECUTIVE DIRECTORS
REGISTRARS
INTERESTED PARTIES

Date: January 31, 2006

From: **DOREATHEA JOHNSON**
Deputy Director, Legal Affairs
Department of Consumer Affairs

Telephone: (916) 574-8250
FAX: (916) 574-8623

Subject: **Public Meetings (Bagley-Keene Open Meeting Act)**

This memorandum is to update you on the provisions of the public meetings law, officially called the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120), Chapter 1, Part 1, Division 3, Title 2 of the Government Code). The attached guide includes all statutory amendments through January 1, 2006, including amendments made by Assembly Bill 277 (Stats. 2005, Chapt. 288). Please disregard all of our previous memoranda on the subject, and our Guide to the Bagley-Keene Open Meeting Act, issued on January 5, 2005.

The primary change authorizes an agency at a regular or special meeting to meet in closed session to consider "matters posing a threat or potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by a state body," where disclosure of those considerations could compromise or impede the safety or security of the described subjects. (Government Code § 11126(c)(18))

We hope you find this document helpful in answering questions you may have about the requirements of the Open Meeting Act. If you have any suggestions for ways to improve the guide in the future, please let us know.

Attachment

GUIDE TO THE

BAGLEY-KEENE OPEN MEETING ACT
(Includes Amendments through January 1, 2006)

Prepared By:

DIVISION OF LEGAL AFFAIRS
Department of Consumer Affairs
1625 N. Market Blvd., Suite S 309
Sacramento, CA 95834
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BAGLEY-KEENE OPEN MEETING ACT

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**GUIDE TO THE
BAGLEY-KEENE OPEN MEETING ACT**
(Includes Amendments through January 1, 2006)

This guide is an update on the provisions of the public meetings law governing state agencies, officially called the Bagley-Keene Open Meeting Act. (Article 9 (commencing with Section 11120), Chapter 1, Part 1, Division 3, Title 2 of the Government Code). The Open Meeting Act closely parallels the Ralph M. Brown Act, which governs meetings of local government agencies. This guide includes all statutory changes through January 1, 2006, including those in Assembly Bill 277 (Stats. 2005, Chapt. 288). Please disregard all earlier memoranda and the previous Guide to the Bagley-Keene Open Meeting Act (distributed January 5, 2005) on this subject.

All statutory references are to the Government Code.

I. PUBLIC POLICY TO CONDUCT PEOPLE'S BUSINESS OPENLY

Section 11120 sets forth the purpose of the law:

"It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

This article shall be known and may be cited as the Bagley-Keene Open Meeting Act."

Each board has essentially three duties under the Open Meeting Act. First, to give adequate notice of meetings to be held. Second, to provide an opportunity for public comment. Third, to conduct such meetings in open session, except where a closed session is specifically authorized. We use the terms "agency" and "board" to mean not only boards, but also commissions and any examining committees or boards within the jurisdiction of the Medical Board of California.

II. BOARD, COMMITTEE, SUBCOMMITTEE, TASK FORCE MEETINGS

A. Definition of a “Meeting”

“Meeting” is defined in the Act as including “any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it pertains.” (§11122.5(a)) The law now prohibits use by a majority of the members of a state body of direct communications, personal intermediaries, or technological devices (such as e-mails) to develop a collective concurrence among the members. (§11122.5(b))

B. Exemptions from Definition of Meeting

The law recognizes that not all gatherings of a majority of members of a state body at a single location constitute a meeting. Current law provides that the provisions of the Act do not apply to the following situations, **provided that** “a majority of the members do not discuss among themselves, other than as part of a scheduled program, business of a specified nature that is within the subject matter jurisdiction of the state body.” (§11122.5(c))

- Individual contacts or conversations between a member of a state body and any other person. (§11122.5(c)(1))
- Attendance by a majority of members at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the state body. (§11122.5(c)(2))
- Attendance by a majority of members at an open and publicized meeting organized to address a topic of state concern by a person or organization other than the state body. (§11122.5(c)(3))
- Attendance by a majority of members at an open and noticed meeting of another state body or of a legislative body of a local agency. (§11122.5(c)(4))
- Attendance by a majority of members at a purely social or ceremonial occasion. (§11122.5(c)(5))
- Attendance by a majority of members at an open and noticed meeting of a standing committee of that body, provided the members of the body who are not members of the committee attend only as observers. (§11122.5(c)(6))

C. Board and Committee Meetings

There are two basic types of meetings held by agencies in the Department of Consumer Affairs. The first type is a board meeting, where a quorum of the members of the board are present. The second type is a committee meeting consisting of less than

a quorum of the members of the full board. Subcommittee and task force meetings are variations of committee meetings.

Board meetings have historically been required to be noticed and open to the public, except where a closed session is authorized. Committee and subcommittee meetings, where less than a quorum of the board is present, are also required to be noticed and open to the public. The only exception is for a committee that consists of fewer than three persons.

Where a committee of fewer than three persons is to meet, and the meeting is not noticed, other members of the board should not attend the meeting, as such attendance would clearly be perceived as an Open Meeting Act violation. Board staff is not precluded from attending such a meeting.

[Restriction on Attendance at Committee Meetings] Commencing January 1, 2001, the law allows attendance by a majority of members at an open and noticed meeting of a standing committee of the board, provided the members of the board who are not members of the committee attend only as observers. (§11122.5(c)(6)) The Office of the Attorney General has addressed in a formal opinion a provision in the Brown Act relating to the attendance of "observers" at a committee meeting. The Attorney General concluded that "[m]embers of the legislative body of a local public agency may not ask questions or make statements while attending a meeting of a standing committee of the legislative body 'as observers.'" The opinion further concluded that such members of the legislative body may not sit in special chairs on the dais with the committee. (81 Ops.Cal.Atty.Gen. 156)

Thus, under the provisions of section 11122.5(c)(6), and the opinion of the California Attorney General, if a majority of members of the full board are present at a committee meeting, members who are not members of the committee that is meeting may attend that meeting only as observers. The board members who are not committee members may not sit on the dais with the committee, and may not participate in the meeting by making statements or asking questions.

If a board schedules its committee meetings seriatim, and other board members are typically present to ultimately be available for their own committee meeting, your notice of the committee meeting should contain a statement to the effect that "Members of the board who are not members of this committee may be attending the meeting only as observers."

Subcommittees may be appointed to study and report back to a committee or the board on a particular issue or issues. If the subcommittee consists of three or more persons, the same provisions apply to its meetings as apply to meetings of committees.

Board chairpersons may occasionally appoint a task force to study and report on a particular issue. One or two board members typically serve as task force members, along with a number of other non-board members. When this is the case, the same Open Meeting Act rules that apply to committee meetings apply to task force meetings.

Such a formally appointed task force falls under the definition of “state body in Section 11121(c).”

III. TYPES OF MEETINGS; PURPOSE; NOTICE; OTHER REQUIREMENTS

Boards and committees may hold several types of meetings, including a regularly scheduled meeting, a “special” meeting, or an “emergency” meeting under the provisions of section 11125.5. This section of the memorandum addresses who can hold certain types of meetings, the purposes for which the meetings can be held, notice requirements, and any other special requirements or prohibitions.

A. Regularly Scheduled Meetings

1. Who May Hold a Regularly Scheduled Meeting

A board, committee, subcommittee, or task force may hold a regularly scheduled meeting. These are the business meetings that are scheduled throughout the year to conduct the usual and customary business of the board. Such meetings may generally be called by the chairperson, or by a majority of the body. However, you must refer to your particular licensing act, which may contain different provisions as to who may call a meeting.

2. Purposes for Which the Meeting May be Held

These meetings are to conduct the usual and customary business of the board, or the business of a committee, subcommittee or task force as directed by the board. The subject matter of the meetings is essentially dictated by the jurisdiction of the board as found in the board’s licensing act. There are no statutory restrictions in the Open Meeting Act on the purposes for which a regularly scheduled meeting may be held.

3. Notice Requirements for a Regularly Scheduled Meeting

a. Board Meetings

An agency is required to give at least 10 calendar days written notice of each board meeting to be held. (§11125(a).) The notice must include the name, address, and telephone number of a person who can provide further information prior to the meeting and must contain the website address where the notice can be accessed. The notice must also be posted on the Internet at least 10 calendar days before the meeting.

In addition to the website posting, effective January 1, 2003, the notice is required to be made available in appropriate alternate formats upon request by any person with a disability.

The notice of each board meeting must include an agenda that is prepared for the meeting. The agenda must include all items of business to be transacted or

discussed at the meeting. " ... A brief general description of an item generally need not exceed 20 words. ... No item shall be added to the agenda subsequent to the provision of this notice." (§11125(b)) This provision does not, however, preclude amending an agenda provided the amended notice is distributed and posted on the Internet at least 10 calendar days prior to the meeting. Effective January 1, 2003, the notice must include information that would enable a person with a disability to know how, to whom, and by when a request may be made for any disability-related modification or accommodation, including auxiliary aids or services. We suggest the following as standard language:

The meeting is accessible to the physically disabled. A person who needs disability-related accommodations or modifications in order to participate in the meeting shall make a request no later than five (5) working days before the meeting to the Board by contacting _____ at (916) _____ or sending a written request to that person at the Board [Address], Sacramento, California, [zip code]. Requests for further information should be directed to [Staff Person's name] at the same address and telephone number.

The definition of "action taken" in Section 11122 is of some aid in determining what the Legislature intended by use of the words "items of business to be transacted."

"11122. As used in this article 'action taken' means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action."

General agenda items such as "New Business," "Old Business," "Executive Officer's Report," "Committee Reports," "President's Report," "Miscellaneous," etc. cannot, without specifying the particular matters thereunder, be used to circumvent this requirement. The Office of the Attorney General has opined that:

"... the purpose of subdivision (b) [of Government Code Section 11125] is to provide advance information to interested members of the public concerning the state body's anticipated business in order that they may attend the meeting or take whatever other action they deem appropriate under the circumstances.

* * *

"We believe that Section 11125 was and is intended to nullify the need for . . . guesswork or further inquiry on the part of the interested public." (67 Ops.Cal.Atty.Gen. 85, 87)

Items not included on the agenda may not be discussed, even if no action is to be taken by the agency. However, we offer two suggestions so members of the public and board members may raise issues that are not on the agenda.

We strongly encourage boards to include an item on their agendas for "Public Comment on Matters Not on the Agenda." This gives persons who are attending a meeting an opportunity to raise any issues they may have, which may not be on the agenda, but which may be appropriate for future board discussion. Matters raised under this agenda item should be discussed only to the extent necessary to determine whether they should be made an agenda item at a future meeting. (§11125.7(a))

We also strongly encourage boards to include an item on their agenda for "Agenda Items for Future Meetings." This allows all board members an opportunity to request specific agenda items for a meeting. Again, these items should be discussed only to the extent necessary to determine whether they should be included as agenda items for a future meeting.

[CAVEAT: If the regularly scheduled meeting will have a closed session agenda item or items, or be held by teleconference, please refer to the discussion of additional requirements under those headings, below.]

The notice and the agenda must be provided to any person who requests it. A member of the public may request notice for a specific meeting, for all meetings at which a particular subject will be discussed or action taken thereon, or for all meetings of the agency. Mailing lists of persons who desire to be notified of more than one meeting must be maintained pursuant to Section 14911, which provides:

"14911. Whenever any state agency maintains a mailing list of public officials or other persons to whom publications or other printed matter is sent without charge, the state agency shall correct its mailing list and verify its accuracy at least once each year. This shall be done by addressing an appropriate postcard or letter to each person on the mailing list. The name of any person who does not respond to such letter or postcard, or who indicates that he does not desire to receive such publications or printed matter, shall be removed from the mailing lists. The response of those desiring to be on the mailing list shall be retained by these agencies for one year."

Effective 1/1/98, a sentence was added to subdivision (c) of Section 11125.1 to state that "Nothing in this article shall be construed to require a state body to place any paid advertisement or any other paid notice in any publication." (Stats. 1997, Chapt. 949; SB 95) The Legal Office interprets this provision to supersede any provisions in particular practice acts which require newspaper publication of board or committee meetings. Boards and committees, of course, retain the discretion to publish notices in newspapers if they so chose.

b. Committee, Subcommittee or Task Force Meetings

Each agency is required to give notice of committee, subcommittee or task force ("committee") meetings to be held. However, this requirement does not apply if the committee consists of less than three persons. It is the number of persons on the committee that is determinative, not how many of the persons are board members. Thus, if a committee consisted of two board members and two other interested persons, its meetings would have to meet all the requirements of the Open Meeting Act.

Notice of committee meetings must be provided and posted on the Internet at least 10 calendar days in advance of the meeting. (§11125(a)) The notice "shall include a brief, general description of the business to be transacted or discussed, and no item shall be added subsequent to the provision of the notice." (§11125(c)) The notice must also include the Website address where the notice can be accessed on the Internet. Although the law does not so specify, we would suggest also including in the notice the name, address, and telephone number of a contact person who can provide further information prior to the meeting. As with board meetings, there is no requirement that the notice be published in any newspaper or other periodical. However, the notice must be provided to any person or persons who have requested to be notified of the particular committee's meetings. You may elect to send such notice to those persons on your regular mailing list.

Remember the need to now post your notice on the Internet at least 10 calendar days in advance of the meeting and to make the notice available in appropriate alternate formats upon request by any person with a disability.

Provision is made for certain non-emergency, but sometimes necessary, committee meetings. Where, during the course of a regularly scheduled and properly noticed board meeting, the board desires that a committee presently discuss an item of business on the agenda, the committee may do so provided (a) the specific time and place of the committee meeting is announced during the public meeting of the board, and (b) the committee meeting is conducted within a reasonable time of, and nearby, the meeting of the board. (§11125(c))

4. Specific Requirements for Regularly-Scheduled Meetings

There are no specific requirements, other than those set forth above, for regularly scheduled board, committee, subcommittee or task force meetings.

5. Specific Prohibitions on Holding a Regularly-Scheduled Meeting

There are no statutory prohibitions in the Open Meeting Act on a board, committee, subcommittee or task force conducting a regularly scheduled meeting.

We again remind you that, with respect to committee meetings, members of the board who are not members of the committee that is meeting may only attend the committee meeting as observers. This means these members may not sit on the dais

with the committee, make any statements, or ask any questions during the committee meeting. (81 Ops.Cal.Atty.Gen. 156)

B. “Special” Meetings

SB 95 of 1997 created a new category of meeting, that being a “special” meeting.

1. Who May Hold a Special Meeting

A board, committee, subcommittee or task force may hold a special meeting.

2. Purposes for Which a Special Meeting May be Held

The only purposes for which a special meeting may be held are set forth in section 11124.5, and are drawn from the purposes for which an emergency meeting could be held under the prior law. In essence, the Legislature recharacterized those purposes as constituting “special” circumstances rather than “emergency” circumstances. Section 11125.4 provides in part that:

”(a) A special meeting may be called at any time by the presiding officer of the state body or by a majority of the members of the state body.

A special meeting may only be called for one of the following purposes where compliance with the 10-day notice provisions of Section 11125 would impose a substantial hardship on the state body or where immediate action is required to protect the public interest:

(1) To consider ‘pending litigation’ as that term is defined in subdivision (e) of Section 11126.

(2) To consider proposed legislation.

(3) To consider issuance of a legal opinion.

(4) To consider disciplinary action involving a state officer or employee.

(5) To consider the purchase, sale, exchange, or lease of real property.

(6) To consider license examinations and applications.

(7) To consider an action on a loan or grant provided pursuant to Division 31 (commencing with Section 50000) of the Health and Safety Code.

(8) To consider its response to a confidential final draft audit report as permitted by Section 11126.2.

* * *

Department of Consumer Affairs licensing boards would most likely hold a special meeting for the purposes set forth in subdivisions (1), (2), (3), (4), and (6).

3. Notice Requirements for a Special Meeting

A special meeting can be called at any time by the presiding officer or a majority of the members of the state body, provided the 10-day notice requirements of section 11125 “would impose a substantial hardship on the state body or where immediate action is required to protect the public interest.” (§11125.4(a)) The only purposes for which the meeting can be held are those set forth above.

The normal 10-day advance notice is not required for special meetings. However, notice of the special meeting is required to be provided to each member of the state agency and to persons who have requested notice of the agency’s meetings as soon as practicable after the decision to hold the meeting is made. Notice to members, newspapers of general circulation, and radio or television stations must be received at least 48 hours in advance of the meeting. Notice to newspapers, radio and television stations is satisfied by providing notice to all national press wire services. Notices to the general public may be given via appropriate electronic bulletin boards or other appropriate mechanisms. (§11125.4(b)) The notice must also be posted on the Internet at least 48 hours in advance of the meeting.

The notice must specify the time and place of the special meeting and the business to be transacted. In essence, an agenda would be prepared. No business other than that noticed may be transacted. Notice is required even if no action is subsequently taken at the meeting. (§11125.4(b)) The notice must contain the Website address where the notice may be accessed on the Internet.

[CAVEAT: If the special meeting will have a closed session agenda item or items, or be held by teleconference, please refer to the discussion of additional requirements under those headings, below.]

4. Specific Requirements During Special Meetings

At the commencement of a special meeting, the agency must make a finding in open session that providing a 10-day notice of the meeting would pose a substantial hardship on the agency, or that immediate action is required to protect the public interest. The specific facts constituting the hardship or need for immediate action must be articulated. This finding must be adopted by a two-thirds (2/3) vote of the agency members present, or if less than two thirds of the members are present, by a unanimous vote of the members present. Failure to adopt the finding terminates the meeting. The agency’s finding must be made available on the Internet. (§11125.4(c))

5. Specific Prohibitions on Holding a Special Meeting

As discussed above, a special meeting may only be held for the purposes set forth in section 11125.4(b). Other than the limitation on the purposes of the meeting, there are no statutory prohibitions in the Open Meeting Act on a board, committee, subcommittee or task force conducting a special meeting.

C. “Emergency” Meetings

1. Who May Hold an Emergency Meeting

A board, committee, subcommittee or task force may hold an emergency meeting.

2. Purposes for Which an Emergency Meeting May be Held

As noted above, S.B. 95 of 1997 recharacterized a number of “emergency” situations as “special” situations. This resulted in the narrowing of situations for which an emergency meeting may be held. Section 11125.5 provides an emergency meeting may be held only in the case of an “emergency situation,” defined as:

“ (1) Work stoppage or other activity that severely impairs public health or safety, or both.

“ (2) Crippling disaster that severely impairs public health or safety, or both.” (§11125.5(b))

3. Notice Requirements for an Emergency Meeting

An emergency meeting may be held without complying with the 10-day notice requirement in Section 11125 or the 48-hour notice requirement in Section 11125.4. However, newspapers of general circulation, television and radio stations that have requested notice of meetings shall be notified of the emergency by telephone at least one hour before the meeting. If telephone services are not functioning, notice is deemed waived. The notice must be posted on the Internet as soon as practicable after the decision to call an emergency meeting has been made. However, newspapers, television and radio must be notified as soon as possible after the meeting of the fact of the meeting, its purpose, and any action taken. (§11125.5(c))

4. Specific Requirements for an Emergency Meeting

The following are required to be posted in a public place and on the Internet for a minimum of 10 days, as soon as possible after the emergency meeting:

- * Minutes of the meeting
- * A list of persons notified, or attempted to be notified, of the meeting

- * Any action taken at the meeting
- * The rollcall vote on action taken (§11125.5(d))

5. Specific Prohibitions on Holding an Emergency Meeting

As discussed above, an emergency meeting may only be held for the purposes set forth in section 11125.5(b).

IV. CLOSED SESSIONS

A. Purposes for Which Closed Session Can be Held

"Closed" sessions were formerly called "executive" sessions. Since all references in the Open Meeting Act have been changed from "executive" session to "closed" session, throughout this memorandum we will refer to such sessions as "closed" sessions.

Section 11123 states that "All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body except as otherwise provided in this article."

Section 11126 sets forth those specific items of business which may be transacted in closed session. Only those enumerated items of business may be conducted in closed session. An agency in the Department may convene a closed session pursuant to Section 11126 for the following purposes.

1. Personnel Matters

A board may meet in closed session to " . . . consider the appointment, employment, evaluation of performance, or dismissal of a public employee or to hear complaints or charges brought against such employee by another person unless the employee requests a public hearing." In order to consider such disciplinary action or dismissal the "employee shall be given written notice of his or her right to have a public hearing . . . which notice shall be delivered to the employee personally or by mail at least 24 hours before the meeting." (§11126(a)) If such a notice is not given any action taken during a closed session for the above reason is null and void. Once the public hearing has been held, the agency may convene into closed session to deliberate on the decision to be reached. (§11126(a)(4))

Prior to January 1, 1995, section 11126(a) did not apply to employees who were appointed to their positions, such as executive officers, executive directors, and registrars (referred to as "executive officer" for convenience). For example, any decision or deliberations made in the selection or dismissal of an executive officer previously had to be conducted in open session. (68 Ops.Cal.Atty.Gen. 34.) However, with the enactment of SB 1316 (Stats. 1994, Chapt. 845) and SB 95 (Stats. 1997, Chapt. 949), a board can now meet in closed session to consider the appointment,

employment, evaluation of, or dismissal of its executive officer, unless the executive officer requests a public hearing. (§11126(a)(1), (2)) SB 1316 supersedes the conclusion reached in 68 Ops.Cal.Atty.Gen. 34. As noted above, once the public hearing has been held, the state body may convene in closed session to deliberate on the decision to be reached. (§11126(a)(4))

If the executive officer does not request a public hearing, he or she must be given the opportunity for a hearing in closed session. After the hearing, the executive officer should be excused from the closed session, and the board may then continue in closed session to deliberate on the decision to be reached. (§11126(a)(4))

Section 11126(a) is not to be interpreted to mean that a board is required to handle civil service personnel matters itself. Normally, this function of an agency is administered by its executive officer in conjunction with the Director of Consumer Affairs, who shares authority with respect to civil service personnel.

2. Examination Matters

A board may meet in closed session to "prepare, approve, grade or administer examinations." (§11126(c)(1)) Essentially, this includes any discussion regarding the actual content of examinations, and their reliability and validity. If an agency is perusing examination samples in order to choose one over the others, this may be done in closed session. On the other hand, if an agency is discussing, for example, the general logistics of administering an examination, then this would not be proper subject matter for a closed session. A basic rule is that if a meeting concerns the grading, specific content, validity of an examination, or examination security, then it can and should be conducted in closed session.

Also, an agency may hear appeals from examinees or re-review examinations in closed session as this would be included in the "grading" of the examination.

3. Matters Affecting Individual Privacy

A committee, consisting of less than a quorum of the full board, may meet in closed session to:

" . . . discuss matters which the [committee] has found would constitute an unwarranted invasion of the privacy of an individual licensee or applicant if discussed in an open meeting, . . . Those matters may include review of an applicant's qualifications for licensure and an inquiry specifically related to the state body's enforcement program concerning an individual licensee or applicant where the inquiry occurs prior to the filing of a civil, criminal, or administrative disciplinary action against the licensee or applicant by the state body." (§11126(c)(2))

Thus, review by a committee (or subcommittee of an examining committee) of an applicant's qualifications for licensure could properly be done in a closed session. Also,

for example, an enforcement committee could convene in closed session to discuss an inquiry related to a particular licensee or licensees prior to any action being filed.

CAVEAT: This closed session provision does not authorize such a review by the full board. Nor does it generally authorize a committee of a board to review complaints, investigation reports, or other information to determine whether disciplinary or other action should be filed against a licensee.

To ensure that board members render an impartial and fair decision in considering an Administrative Law Judge's proposed decision, board members are precluded from involving themselves in the investigation or prosecution phase of an action. (§11430.10 *et seq.*) The board's role is that of judge in the case. If a particular board member has any significant involvement in the investigative or prosecution phases, he or she must disqualify himself/herself from participation in the board's action relative to the proposed decision, and not attempt to influence any other board member regarding the decision. Legal counsel should be consulted before any enforcement actions are discussed with individual licensees, as such discussions may impact participation by the member in a final decision on a case (§11430.60), and may require disclosures under the provisions of the state's Administrative Procedure Act. (§11430.50)

Even though these committee meetings may consist entirely of subject matter proper for closed session they are required to be noticed as discussed above.

4. Administrative Disciplinary Matters

A board may meet in closed session to deliberate on a decision in an administrative disciplinary proceeding under the Administrative Procedure Act. (§11400, *et seq.*; §11126(c)(3)) In the closed session, the board may decide whether to adopt a Proposed Decision, review a transcript of a hearing and render a decision of its own, deliberate upon evidence heard by the agency itself, or consider a stipulation.

This section does not authorize an agency to convene into closed session for the purpose of assigning cases, *i.e.* deciding whether a case should be heard by a hearing officer alone or by the agency itself with a hearing officer. This section does not authorize an agency to convene into closed session to review investigation files or complaints. Members of boards that have the discretion to hear cases should not review pending complaints or investigation files for the reasons given above.

5. Board of Accountancy Matters

The administrative committee established by the State Board of Accountancy pursuant to Business and Professions Code Section 5020 may convene in a closed session to "consider disciplinary action against an individual accountant prior to the filing of an accusation." (§11126(f)(3)) And the examining committee established by that board pursuant to Business and Professions Code Section 5023 may convene in closed

session to "interview an individual applicant or accountant regarding the applicant's qualifications."

As noted above, such administrative and examining committee meetings are required to be noticed as previously discussed in this memorandum.

6. Pending Litigation

A board may meet in closed session to confer with or receive advice from its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation. (§11126(e)(1)) Again, please note the very specific notice requirements discussed below when a closed session is to be held to discuss "pending litigation". Litigation means an adjudicatory proceeding before a court, administrative body, hearing officer or arbitrator. Litigation is considered to be pending if, (1) it has been initiated formally (e.g. a complaint, claim or petition has been filed) or (2) based on existing facts and circumstances and on the advice of its legal counsel, the state body believes there is significant exposure to litigation against it, or it is meeting to decide whether a closed session is authorized because of significant exposure to litigation or (3) based on existing facts and circumstances, the state body has decided or is deciding whether to initiate litigation. (§11126(e)(2))

The agency's legal counsel must submit a memorandum which complies with the requirements of Section 11126(e)(2)(C)(ii) prior to the closed session if possible, but no later than one week after the closed session. This document is confidential until the pending litigation has been finally adjudicated or otherwise settled. (§6254.25)

7. Response to Confidential Final Draft Audit Report

Section 11126.2 (added effective January 1, 2005) permits an agency to meet in closed session to discuss its response to a confidential final draft audit report from the Bureau of State Audits. However, once that audit report becomes final and is released to the public, the agency may only discuss it in open session.

8. Threat of Criminal or Terrorist Activity

Effective January 1, 2006, AB 277 (Chap. 288, Stats. 2005) authorizes an agency at a regular or special meeting to meet in closed session to consider "matters posing a threat or potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the state body," where disclosure of those considerations could compromise or impede the safety or security of the described subjects. The law (Section 11126(c)(18)) requires the agency to authorize the closed session by a two-thirds vote of the members present at the meeting.

9. Advisory Bodies/Committees May Meet in Closed Session

To the extent a licensing board, which is defined as a “state body” in the Open Meeting Act, is authorized to meet in closed session, then committees, subcommittees, or other bodies advisory to the licensing board, which are also defined as “state bodies,” may meet in closed session for the same purposes as the licensing board. (§11126((f), (4)-(6))

10. Open Session Otherwise Required

Any other business transacted by an agency must be in open session. Only for the above-mentioned reasons may a board within the Department of Consumer Affairs meet in closed session. (§11132) A board may not meet in closed session for the purpose of electing officers or to discuss the proposal or adoption of rules and regulations. Further, a board may not convene in closed session to discuss testimony received during a hearing on proposed rules and regulations. Finally, an agency may not meet in closed session because it wants to have a frank and open discussion among only members on a matter of controversy. In order for an agency to meet in closed session, the closed session must be specifically authorized by statute.

B. Notice and Reporting Requirements for Closed Sessions

1. Notice of Closed Session

When a closed session will constitute part or all of a meeting, it is important to note Government Code Section 11126.3, which requires that:

"(a) Prior to holding any closed session, the state body shall disclose, in an open meeting, the general nature of the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda. [A provision applicable to the Public Utilities Commission is not included herein.] If the session is closed pursuant to subparagraph (A) of paragraph (2) of subdivision (e) of Section 11126 [litigation has already commenced], the state body shall state the title of, or otherwise specifically identify, the litigation to be discussed unless the body states that to do so would jeopardize the body's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage."

Thus, if the meeting will consist in part or in its entirety of a closed session, you must include on the notice of the meeting the above-described information. Pay particular attention to these very specific requirements if the closed session is to discuss pending litigation. Please note that to obtain legal advice in closed session concerning pending litigation, the notice must cite subdivision (e) of Section 11126 and your

attorney must prepare a memorandum stating the specific reasons and legal authority for the closed session. Subdivisions of Government Code Section 11126, discussed under "Closed Sessions" above, will generally be the statutory authority cited.

If a closed session agenda to discuss pending litigation has been properly published, and an additional pending litigation issue subsequently arises, the state agency may discuss the new matter in closed session provided that postponement of the discussion would prevent the state agency from complying with any statutory, court-ordered, or other legally-imposed deadline. The state agency must publicly announce the title of, or otherwise identify, the litigation unless to do so would jeopardize the ability to effectuate service of process, or to do so would jeopardize the agency's ability to conclude existing settlement negotiations to its advantage. (§11126.3(d))

If you intend to have a closed session during your meeting, you should first contact your Legal Division attorney to ensure that a closed session is authorized and properly noticed.

2. Reporting After a Closed Session

Section 11126.3(f), requires a state body to convene in open session after a closed session and to report as required in Section 11125.2 , which states that:

“ Any state body shall report publicly at a subsequent public meeting any action taken, and any rollcall vote thereon, to appoint, employ, or dismiss a public employee arising out of any closed session of the state body.”

C. Other Procedural Requirements for Closed Sessions

There are certain additional requirements that must be met when closed sessions are to be held.

1. All closed sessions must be held during a regular or special meeting (§11128); they may not be scheduled independently of a noticed meeting of the board or committee. Where, for example, a board or committee meeting is scheduled to discuss only matters appropriate for a closed session, the meeting should be opened as a public meeting with an announcement immediately following that the agency will convene into closed session.

2. As discussed under "Notice Required," above, prior to holding the closed session the agency must announce the general reason(s) for the closed session and the specific statutory or other legal authority under which the session is held. (§11126.3 (a)) With respect to litigation that has already been initiated, it must announce the title of or otherwise identify the litigation. (§11126.3(a)) Other specific notice requirements, discussed above, also apply to notices regarding pending litigation. In the closed session, only matters covered in the statement may be discussed. (§11126.3(b))

3. The agency is required to designate a staff person to attend the closed session and to record in a minute book a record of topics discussed and decisions made. (§11126.1)

4. The minute book referenced in (3) is available only to members of the agency, or if a violation of the Open Meeting Act is alleged, to a court of general jurisdiction. (§11126.1)

5. Information received and discussions held in closed session are **confidential** and must not be disclosed to outside parties by members or staff who attended the closed session. A recent opinion of the Office of the California Attorney General concluded that:

“ A local school board member may not publicly disclose information that has been received and discussed in closed session concerning pending litigation unless the information is authorized by law to be disclosed.” (80 Ops.Cal.Atty.Gen. 231)

That opinion also cited a previous opinion, in which the Attorney General stated that “We have ... routinely observed that it would be *improper* for information received during a closed session to be publicly disclosed.” (76 Ops.Cal.Atty.Gen. 289, 290-291; Emphasis in the original.)

V. MEETING BY TELECONFERENCING

Prior to January 1, 1995, the Bagley-Keene Open Meeting Act contained no provision for conducting meetings where the participating members were not physically present in one location.

Effective 1/1/95, subdivision (b) was added to Government Code section 11123 to authorize meetings by teleconference. (Stats. 1994, Chapt. 1153; AB 3467) That subdivision has been amended several times, most recently by AB 192 of 2001, and it currently provides:

"(a) All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body except as otherwise provided in this article.

"(b) (1) This article does not prohibit a state body from holding an open or closed meeting by teleconference for the benefit of the public and state body. The meeting or proceeding held by teleconference shall otherwise comply with all applicable requirements or laws relating to a specific type of meeting or proceeding, including the following:

(A) The teleconferencing meeting shall comply with all requirements of this article applicable to other meetings.

(B) The portion of the teleconferenced meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting.

(C) If the state body elects to conduct a meeting or proceeding by teleconference, it shall post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the rights of any party or member of the public appearing before the state body. Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public. The agenda shall provide an opportunity for members of the public to address the state body directly pursuant to Section 11125.7 at each teleconference location.

(D) All votes taken during a teleconferenced meeting shall be by rollcall.

(E) The portion of the teleconferenced meeting that is closed to the public may not include the consideration of any agenda item being heard pursuant to Section 11125.5.

(F) At least one member of the state body shall be physically present at the location specified in the notice of the meeting.

(2) For the purposes of this subdivision, 'teleconference' means a meeting of a state body, the members of which are at different locations, connected by electronic means, through either audio or both audio and video. This section does not prohibit a state body from providing members of the public with additional locations in which the public may observe or address the state body by electronic means, through either audio or both audio and video."

A method is thus available whereby meetings may be conducted by audio or video teleconferencing provided the criteria set forth in the statute have been met. Note the restriction in subdivision (b)(1)(E) that prohibits a closed session emergency meeting. Emergency meetings in open session may be conducted by teleconference.

We emphasize that the law now requires every teleconference meeting location to be identified in the notice and agenda and to be open to the public. Most importantly, the members of the agency must attend the meeting at a public location. Members are no longer able to attend the meeting via teleconference from their offices, homes, or other convenient location unless those locations are identified in the notice and agenda, and the public is permitted to attend at those locations. Nothing prohibits additional locations, where only the public is connected to the teleconference meeting. (§11123(b)(2))

VI. DELIBERATIONS AND VOTING

Keep in mind the Open Meeting Act declaration of legislative intent that actions of state agencies be taken openly and that their deliberation be conducted openly. (§11120) In this regard, there are a number of provisions in the Open Meeting Act which address deliberations and voting.

A. Seriatim Calls to Individual Agency Members Prohibited

Except as authorized by the above-discussed teleconferencing statutes, telephone conference calls may not be used to avoid the requirements of the Open Meeting Act. A conference call including members of a board, committee, subcommittee or task force sufficient to constitute a quorum of that state body is prohibited, except pursuant to an authorized teleconference meeting.

In a case involving the Ralph M. Brown Act, the court concluded that a series of one-to-one telephone calls between members of a local body, where the purpose of the calls was to obtain a collective commitment on an issue, constituted a violation of the Act. (*Stockton Newspapers, Inc. v. Members of the Redevelopment Agency of the City of Stockton* (1985) 171 Cal.App.3d 95) The Brown Act is the local agency counterpart to the Bagley-Keene Open Meeting Act, and decisions rendered on its provisions are frequently followed in Open Meeting Act cases.

Citing the *Stockton Newspapers, Inc.* case, the court in *Sutter Bay Associates v. County of Sutter* held that to prevent evasion of the Brown Act, a series of private meetings (known as serial meetings) by which a majority of the members of the legislative body commit themselves to a decision concerning public business or engage in collective deliberation on public business would violate the open meeting requirement. ((1997) 58 Cal.App.4th 860, 877, 68 Cal.Rptr.2d 492, 502)

B. E-Mail Prohibition

AB 192 of 2001 added subdivision (b) to section 11122.5 to provide:

"Except as authorized pursuant to Section 11123, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body is prohibited."

The enactment of subdivision (b) of section 11122.5, expands upon and confirms a recent opinion of the Attorney General prohibiting the use of e-mail to reach a collective decision outside a regularly scheduled meeting. In 84 Ops.Cal.Atty.Gen. 30, the Attorney General concluded that:

"A majority of the board members of a local public agency may not e-mail each other to develop a collective concurrence as to action to be taken by the board without violating the Ralph M. Brown Act even if the e-mails are also sent to the secretary and chairperson of the agency, the e-mails are posted on the agency's Internet website, and a printed version of each e-mail is reported at the next public meeting of the board."

As noted above, interpretations of the Brown Act, which governs local public agencies, are often cited as authority in interpreting similar provisions of the Bagley-Keene Open Meeting Act.

Members of a board must refrain from calling or otherwise contacting other members on a one-to-one basis, or conducting serial meetings, in order to arrive at a collective decision outside the meeting on a matter pending before the board.

C. Secret Ballot Prohibited

An agency may not vote by secret ballot in a public meeting nor vote in closed session on any matter where discussion, deliberations, or action taken is required to be in an open meeting. (68 Ops.Cal.Atty.Gen. 65, 69)

For example, the election of board officers may not be conducted by secret ballot or in closed session.

D. Voting by Proxy Prohibited

Voting by proxy is not authorized. (68 Ops.Cal.Atty.Gen. 65, 70)

E. Voting by Mail on Administrative Disciplinary Matters

As a general rule, all voting on items of business to be transacted must be done at a public meeting. However, the Administrative Procedure Act authorizes mail voting on all questions arising under that act. (Govt. Code §11526.) Thus, board members may vote by mail on proposed decisions, stipulated decisions, and other matters in connection with a formal disciplinary case. No other votes may be cast by mail. (68 Ops.Cal.Atty.Gen. 65, 69)

VII. MISCELLANEOUS PROVISIONS

There are several provisions governing public meetings which do not fit under any of the above headings, but of which you should be aware.

A. Conforming Board Member's Conduct

Any person who has been appointed as a member of a state body, who has not yet assumed the duties of the office, must conform his or her conduct to the provisions of the Open Meeting Act. (§11125.95)

B. Providing Open Meeting Act to New Board Members

A copy of the Bagley-Keene Open Meeting Act must be provided to each agency member upon his or her appointment to office. Each agency should insure that a copy is given to each new member. (§11121.9.)

C. Prohibition on Placing Conditions on Public's Attendance

1. Sign-in

No person can be required to register or sign-in or fulfill any other condition in order to attend a public meeting of an agency. This does not mean that speakers and witnesses cannot be asked to identify themselves for the board's record or minutes.

If an attendance list, register, questionnaire, or other similar document is posted at or near the entrance to the room where the meeting is to be held, or is circulated to persons present during the meeting, "it shall state clearly that the signing, registering, or completion of the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers, or completes the document." (§11124)

2. Discrimination in Admittance to Meeting Facility

A meeting may not be held in any facility that prohibits the admittance of any persons on the basis of race, religious creed, color, national origin, ancestry, or sex. (§11131)

3. Access for the Disabled

All meetings must be accessible to the disabled. (§11131)

4. Charging a Fee or Requiring a Purchase for Access

The Open Meeting Act prohibits holding a meeting in any location where the public is required to pay a fee or make a purchase to attend. (§11131)

D. Agency Recording of the Proceedings

A tape or film record of an open and public meeting made by the agency must be made available for public inspection under the California Public Records Act, but may be erased or destroyed 30 days after the taping or recording. An inspection must be provided without charge on an audio or video tape player made available by the state agency. (§11124.1(b))

E. Public's Right to Record the Proceedings

Persons attending a public meeting have a right to record the proceedings with an audio or video tape recorder or still or motion picture camera, in the absence of a reasonable finding by the agency that the recording could not continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings. (§11124.1(a))

F. Media Broadcast of the Proceedings

A state body may not prohibit or otherwise restrict the broadcast of a public meeting in the absence of a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the proceedings. (§11124.1(c))

G. Taking Agenda Items Out of Order

Items listed on the agenda may be taken up out of order, provided the purpose of moving the agenda items is not to frustrate public or other input on the item. It is a good practice to note on either the top or the bottom of your agenda that "All times indicated and the order of business are approximate and subject to change," to alert members of the public this is a possibility.

If your agency schedules a multiple day meeting and may move items scheduled for a subsequent day to an earlier day, you should provide notice of this possibility on your agenda. Suggested language is that "Items scheduled for a particular day may be moved to an earlier day to facilitate the board's business." Again, the purpose may not be to frustrate public or other input.

H. Opportunity for Public Comment at Meetings

Section 11125.7 addresses the subject of public comment at board meetings. With specified exceptions, that section requires state agencies to provide an opportunity for members of the public to directly address the state agency on each agenda item before or during the agency's discussion or consideration of the item. This opportunity for comment need not be made available if:

1. The agenda item has previously been considered at a public meeting by a committee comprised exclusively of board members, where members of the public were provided an opportunity to address the item. However, if the item has been substantially changed since the committee meeting, a new opportunity to address the agency would be required at the full board meeting.
2. The agenda item is one that may properly be considered in closed session, which would include deliberation and action on disciplinary proceedings under the Administrative Procedure Act. (§11125.7)

If a board wishes to establish a standing rule that discussion of agenda items will be given a specified amount of time, or that public comment will be limited to a certain amount of time, the board may do that by adopting an administrative regulation. (§11125.7(b))

The law specifically provides that a state agency may not prohibit public criticism of its policies, programs, or services, or of the acts or omissions of the agency. (§11125.7(c))

VIII. DISCLOSURE OF DOCUMENTS

A. Documents Distributed Prior to the Meeting

When writings which are public records are distributed to all, or a majority of all, of the members of a board or committee for discussion or consideration at a public meeting, the writings must be made available for public inspection. Generally, the records must be made available for inspection at the time of distribution to agency members. (§11125.1(a)) Records exempt from disclosure under Sections 6253.5, 6254 or 6254.7 of the Public Records Act need not be disclosed even though the subject matter of the records may be considered or discussed at the meeting. This includes records which are drafts, notes or memoranda which will not be retained by the agency, records of pending litigation and claims against the state, personnel, medical or similar files, complaint and investigation files, except for Accusations and Proposed Decisions, and any records or data relating to examinations.

B. Documents Distributed During the Meeting

When public records pertaining to an agenda item are prepared by the state body or a member of the state body, and distributed to state body members during a meeting, the documents must be made available for public inspection at the meeting. If records are prepared by some other person, and distributed to members of the state body during a meeting, the documents must be made available for public inspection after the meeting. (§11125.1(b)) Records exempt from public disclosure under specified statutes are not required to be publicly disclosed. (§11125.1(a), (b))

C. Charging a Fee for Public Documents

Under section 11126.7, an agency may not charge a fee for a notice, including the agenda, of a meeting, and may only charge those fees specifically authorized for public documents that are considered at the meeting

At its discretion, an agency may charge a fee to cover reproduction costs for providing the documents required to be made available, as discussed in paragraph (B), immediately above. If an agency charges a fee, it is limited to the direct costs of duplication authorized in Section 6257 for the reproduction of public records. (§11125.1(c))

Effective January 1, 2003, documents distributed prior to or during a meeting that are public records must be made available, upon request by a person with a disability, in appropriate alternative formats. No extra charge can be imposed for putting those documents into an alternative format.

IX. PENALTIES

Under previous law, any interested person could commence court action (mandamus, injunction, declaratory relief) to stop or prevent violations or threatened violations of the Open Meeting Act. SB 95, effective 1/1/98, added the Attorney General and the district attorney to the list of those who may commence such action. Court costs and reasonable attorney's fees may be awarded to a successful plaintiff to be paid from the funds of the agency. (§11130.5)

SB 95 also expanded the law to authorize the Attorney General, a district attorney, or any interested person to seek court action "to determine whether any rule or action by the state body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, ..." (§11130(a)) This appears to be a rather unique provision, and its implications are unknown at this time.

SB 95 further expanded the law to authorize the Attorney General, a district attorney, or any interested person to seek a court action to compel a state agency to tape record its closed sessions. Upon a judgment of a violation of Section 11126, a court could so compel an agency. Discovery procedures for the tape recordings are also set forth. (§11130(b), and (c))

Section 11130.3 authorizes a person to institute a court action to obtain a judicial determination that an action taken in violation of the notice provisions or the provisions governing closed sessions of the Act is null and void. Court costs and reasonable attorney's fees may also be awarded to a successful plaintiff under this section. This section reinforces the need for a specific, informative agenda as required by Section 11125.

In *Regents of the University of California v. Superior Court (Molloy)*, the California Supreme Court held the remedies under the Bagley-Keene Open Meeting Act applied only to present and future violations, and that the 30-day statute of limitations for bringing an action against an agency for violations of the Act could not be extended. ((1999) 20 Cal.4th 509, 85 Cal.Rptr.2d 257)

AB 1234 amended the Open Meeting Act effective January 1, 2000, to provide that the remedies extend to past actions of an agency, and extends the statute of limitations for bringing an action from 30 days to 90 days. (§§11130(c) and 11130.3(a), respectively) The bill states its intent is to expressly supersede the holding in the *Regents v. Superior Court (Molloy)* case.

Section 11130.7 of the Act provides:

"Each member of a state body who attends a meeting of such body in violation of any provision of this article, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled, is guilty of a misdemeanor."
(Emphasis added.)

The Legal Division trusts this guide will be of assistance in answering those questions which frequently arise concerning meetings of your agency. If you have any questions, please contact your assigned Legal Division attorney.

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11120. Public policy; legislative finding and declaration; citation of article

It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.

In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly.

The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

This article shall be known and may be cited as the Bagley-Keene Open Meeting Act.

(Added by Stats.1967, c. 1656, p. 4026, § 122. Amended by Stats.1980, c. 1284, p. 4333, § 4; Stats. 1981, c. 968, p. 3683, § 4.)

11121. State body defined

As used in this article, "state body" means each of the following:

(a) Every state board, or

commission, or similar multimember body of the state that is created by statute or required by law to conduct official meetings and every commission created by executive order.

(b) A board, commission, committee, or similar multimember body that exercises any authority of a state body delegated to it by that state body.

(c) An advisory board, advisory commission, advisory committee, advisory subcommittee, or similar multimember advisory body of a state body, if created by formal action of the state body or of any member of the state body, and if the advisory body so created consists of three or more persons.

(d) A board, commission, committee, or similar multimember body on which a member of a body that is a state body pursuant to this section serves in his or her official capacity as a representative of that state body and that is supported, in whole or in part, by funds provided by the state body, whether the multimember body is organized and operated by the state body or by a private corporation.

(Added by Stats.1967, c. 1656, p. 4026, § 122. Amended by Stats.1980, c. 515, § 1; Stats.1981, c. 968, p. 3683, § 5; Stats.1984, c. 193, § 38. Amended by Stats.1996, c. 1023 (S.B.1497), § 88, eff. Sept. 29, 1996; Stats.1996, c. 1064 (A.B.3351), § 783.1, operative July 1, 1997; Stats.2001, c. 243 (A.B.192), § 1; Amended Stats. 2003 ch 62 § 117 (SB 600)).

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11121.1. State body; exclusions

As used in this article, "state body" does not include any of the following:

(a) State agencies provided for in Article VI of the California Constitution.

(b) Districts or other local agencies whose meetings are required to be open to the public pursuant to the Ralph M. Brown Act (Chapter 9 (commencing with Section 54950) of Part 1 of Division 2 of Title 5).

(c) State agencies provided for in Article IV of the California Constitution whose meetings are required to be open to the public pursuant to the Grunsky-Burton Open Meeting Act (Article 2.2 (commencing with Section 9027) of Chapter 1.5 of Part 1 of Division 2 of Title 2).

(d) State agencies when they are conducting proceedings pursuant to Section 3596.

(e) State agencies provided for in Section 109260 of the Health and Safety Code, except as provided in Section 109390 of the Health and Safety Code.

(f) State agencies provided for in Section 11770.5 of the Insurance Code.

(g) The Credit Union Advisory Committee established pursuant to Section 14380 of the Financial Code.

(Added by Stats.2001, c. 243 (A.B.192), § 2.)

11121.2. Repealed by Stats.2001, c. 243 (A.B.192), § 3

The repealed section, added by Stats.1981, c. 968, p. 3684, § 5.2, related to multimember body with authority from state body.

11121.7. Repealed by Stats.2001, c. 243 (A.B.192), § 4

The repealed section, added by Stats.1980, c. 1284, p. 4333, § 5, amended by Stats.1981, c. 968, p. 3685, § 6, related to representatives of the state body.

11121.8. Repealed by Stats.2001, c. 243 (A.B.192), § 5

The repealed section, added by Stats.1981, c. 968, p. 3684, § 7, related to advisory bodies.

11121.9. Provision of copy of article to members of state body

Each state body shall provide a copy of this article to each member of the state body upon his or her appointment to membership or assumption of office.

(Added by Stats.1980, c. 1284, p. 4334, § 6. Amended by Stats.1981, c. 714, p. 2659, § 175; Stats.1981, c. 968, p. 3685, § 7.1.)

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11121.95. Appointees or elected officials not yet in office; conformity of conduct to article requirements

Any person appointed or elected to serve as a member of a state body who has not yet assumed the duties of office shall conform his or her conduct to the requirements of this article and shall be treated for purposes of this article as if he or she has already assumed office.

(Added by Stats.1997, c. 949 (S.B.95), § 1.)

11122. Action taken

As used in this article "action taken" means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action.

(Added by Stats.1967, c. 1656, p. 4026, § 122.
Amended by Stats.1981, c. 968, p. 3685, § 7.3.)

11122.5. Meeting defined; collective concurrence prohibited; exceptions

(a) As used in this article, "meeting" includes any congregation of a majority of the members of a state body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the state body to which it

pertains.

(b) Except as authorized pursuant to Section 11123, any use of direct communication, personal intermediaries, or technological devices that is employed by a majority of the members of the state body to develop a collective concurrence as to action to be taken on an item by the members of the state body is prohibited.

(c) The prohibitions of this article do not apply to any of the following:

(1) Individual contacts or conversations between a member of a state body and any other person.

(2) The attendance of a majority of the members of a state body at a conference or similar gathering open to the public that involves a discussion of issues of general interest to the public or to public agencies of the type represented by the state body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specified nature that is within the subject matter jurisdiction of the state body. This paragraph is not intended to allow members of the public free admission to a conference or similar gathering at which the organizers have required other participants or registrants to pay fees or charges as a condition of attendance.

(3) The attendance of a majority of the members of a state body at an open and publicized meeting organized

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to address a topic of state concern by a person or organization other than the state body, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled program, business of a specific nature that is within the subject matter jurisdiction of the state body.

(4) The attendance of a majority of the members of a state body at an open and noticed meeting of another state body or of a legislative body of a local agency as defined by Section 54951, provided that a majority of the members do not discuss among themselves, other than as part of the scheduled meeting, business of a specific nature that is within the subject matter jurisdiction of the other state body.

(5) The attendance of a majority of the members of a state body at a purely social or ceremonial occasion, provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the state body.

(6) The attendance of a majority of the members of a state body at an open and noticed meeting of a standing committee of that body, provided that the members of the state body who are not members of the standing committee attend only as observers.

(Added by Stats.2001, c. 243 (A.B.192), § 6.)

11123. Meetings; attendance; teleconference option

(a) All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body except as otherwise provided in this article.

(b)(1) This article does not prohibit a state body from holding an open or closed meeting by teleconference for the benefit of the public and state body. The meeting or proceeding held by teleconference shall otherwise comply with all applicable requirements or laws relating to a specific type of meeting or proceeding, including the following:

(A) The teleconferencing meeting shall comply with all requirements of this article applicable to other meetings.

(B) The portion of the teleconferenced meeting that is required to be open to the public shall be audible to the public at the location specified in the notice of the meeting.

(C) If the state body elects to conduct a meeting or proceeding by teleconference, it shall post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the rights of any party or member of the public appearing before the state body. Each teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the

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public. The agenda shall provide an opportunity for members of the public to address the state body directly pursuant to Section 11125.7 at each teleconference location.

(D) All votes taken during a teleconferenced meeting shall be by rollcall.

(E) The portion of the teleconferenced meeting that is closed to the public may not include the consideration of any agenda item being heard pursuant to Section 11125.5.

(F) At least one member of the state body shall be physically present at the location specified in the notice of the meeting.

(2) For the purposes of this subdivision, "teleconference" means a meeting of a state body, the members of which are at different locations, connected by electronic means, through either audio or both audio and video. This section does not prohibit a state body from providing members of the public with additional locations in which the public may observe or address the state body by electronic means, through either audio or both audio and video.

(Added by Stats.1967, c. 1656, p. 4026, § 122. Amended by Stats.1981, c. 968, p. 3685, § 7.5. Amended by Stats.1994, c. 1153 (A.B.3467), § 1; Stats.1997, c. 52 (A.B.1097), § 1; Stats.2001, c. 243 (A.B.192), § 7.)

11123.1. State body meetings to meet protections and prohibitions of the Americans with Disabilities Act

All meetings of a state body that are open and public shall meet the protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof.

(Added by Stats. 2002, c. 300 (A.B. 3035), § 1.)

11124. Conditions to attendance

No person shall be required, as a condition to attendance at a meeting of a state body, to register his or her name, to provide other information, to complete a questionnaire, or otherwise to fulfill any condition precedent to his or her attendance.

If an attendance list, register, questionnaire, or other similar document is posted at or near the entrance to the room where the meeting is to be held, or is circulated to persons present during the meeting, it shall state clearly that the signing, registering, or completion of the document is voluntary, and that all persons may attend the meeting regardless of whether a person signs, registers, or completes the document.

(Added by Stats.1967, c. 1656, p. 4026, § 122. Amended by Stats.1981, c. 968, p. 3685, § 8.)

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11124.1. Tape or film recording of proceedings; inspection of state's recording; broadcast restrictions

(a) Any person attending an open and public meeting of the state body shall have the right to record the proceedings with an audio or video tape recorder or a still or motion picture camera in the absence of a reasonable finding by the state body that the recording cannot continue without noise, illumination, or obstruction of view that constitutes, or would constitute, a persistent disruption of the proceedings.

(b) Any tape or film record of an open and public meeting made for whatever purpose by or at the direction of the state body shall be subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), but may be erased or destroyed 30 days after the taping or recording. Any inspection of an audio or video tape recording shall be provided without charge on an audio or video tape player made available by the state body.

(c) No state body shall prohibit or otherwise restrict the broadcast of its open and public meetings in the absence of a reasonable finding that the broadcast cannot be accomplished without noise, illumination, or obstruction of view that would constitute a persistent disruption of the proceedings.

(Added by Stats.1980, c. 1284, p. 4334, § 7.
Amended by Stats.1981, c. 968, p. 3685, § 9.
Amended by Stats.1997, c. 949 (S.B.95), § 2.)

11125. Notice of meeting

(a) The state body shall provide notice of its meeting to any person who requests that notice in writing. Notice shall be given and also made available on the Internet at least 10 days in advance of the meeting, and shall include the name, address, and telephone number of any person who can provide further information prior to the meeting, but need not include a list of witnesses expected to appear at the meeting. The written notice shall additionally include the address of the Internet site where notices required by this article are made available.

(b) The notice of a meeting of a body that is a state body shall include a specific agenda for the meeting, containing a brief description of the items of business to be transacted or discussed in either open or closed session. A brief general description of an item generally need not exceed 20 words. A description of an item to be transacted or discussed in closed session shall include a citation of the specific statutory authority under which a closed session is being held. No item shall be added to the agenda subsequent to the provision of this notice, unless otherwise permitted by this article.

(c) Notice of a meeting of a state body that complies with this section shall also constitute notice of a meeting of an advisory body of that state body, provided that the business to be

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discussed by the advisory body is covered by the notice of the meeting of the state body, provided that the specific time and place of the advisory body's meeting is announced during the open and public state body's meeting, and provided that the advisory body's meeting is conducted within a reasonable time of, and nearby, the meeting of the state body.

(d) A person may request, and shall be provided, notice pursuant to subdivision (a) for all meetings of a state body or for a specific meeting or meetings. In addition, at the state body's discretion, a person may request, and may be provided, notice of only those meetings of a state body at which a particular subject or subjects specified in the request will be discussed.

(e) A request for notice of more than one meeting of a state body shall be subject to the provisions of Section 14911.

(f) The notice shall be made available in appropriate alternative formats, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, upon request, by any person with a disability. The notice shall include information regarding how, to whom, and by when a request for any disability-related modification or accommodation, including auxiliary aids or services may be made by a person with a disability who requires these aids or services in

order to participate in the public meeting.

(Added by Stats.1967, c. 1656, p. 4026, § 122. Amended by Stats.1973, c. 1126, p. 2291, § 1; Stats.1975, c. 708, p. 1695, § 1; Stats.1979, c. 284, § 1, eff. July 24, 1979; Stats.1981, c. 968, p. 3685, § 10. Amended by Stats.1997, c. 949 (S.B.95), § 3; Stats.1999, c. 393 (A.B.1234), § 1; Stats.2001, c. 243 (A.B.192), § 8; Stats. 2002, c. 300 (A.B. 3035), § 2.)

11125.1. Agendas and other writings distributed for discussion or consideration at public meetings; public records; Franchise Tax Board; inspection; availability on the Internet; closed sessions

(a) Notwithstanding Section 6255 or any other provisions of law, agendas of public meetings and other writings, when distributed to all, or a majority of all, of the members of a state body by any person in connection with a matter subject to discussion or consideration at a public meeting of the body, are disclosable public records under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be made available upon request without delay. However, this section shall not include any writing exempt from public disclosure under Section 6253.5, 6254, or 6254.7 of this code, or Section 489.1 or 583 of the Public Utilities Code.

(b) Writings that are public records under subdivision (a) and that are distributed to members of the state body prior to or during a meeting,

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pertaining to any item to be considered during the meeting, shall be made available for public inspection at the meeting if prepared by the state body or a member of the state body, or after the meeting if prepared by some other person. These writings shall be made available in appropriate alternative formats, as required by Section 202 of the American with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof, upon request by a person with a disability.

(c) In the case of the Franchise Tax Board, prior to that state body taking final action on any item, writings pertaining to that item that are public records under subdivision (a) that are prepared and distributed to members of the state body by the Franchise Tax Board staff or individual members prior to or during a meeting shall be:

(1) Made available for public inspection at that meeting.

(2) Distributed to all persons who request notice in writing pursuant to subdivision (a) of Section 11125.

(3) Made available on the Internet.

(d) Prior to the State Board of Equalization taking final action on any item that does not involve a named tax or fee payer, writings pertaining to that item that are public records under subdivision (a) that are prepared and distributed by board staff or individual

members to members of the state body prior to or during a meeting shall be:

(1) Made available for public inspection at that meeting.

(2) Distributed to all persons who request or have requested copies of these writings.

(3) Made available on the Internet.

(e) Nothing in this section shall be construed to prevent a state body from charging a fee or deposit for a copy of a public record pursuant to Section 6253, except that no surcharge shall be imposed on persons with disabilities in violation of Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. The writings described in subdivision (b) are subject to the requirements of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall not be construed to limit or delay the public's right to inspect any record required to be disclosed by that act, or to limit the public's right to inspect any record covered by that act. This section shall not be construed to be applicable to any writings solely because they are properly discussed in a closed session of a state body. Nothing in this article shall be construed to require a state body to place any paid advertisement or any other paid notice in any publication.

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(f) "Writing" for purposes of this section means "writing" as defined under Section 6252.

(Added by Stats.1975, c. 959, p. 2238, § 4. Amended by Stats.1980, c. 1284, p. 4334, § 8; Stats.1981, c. 968, p. 3686, § 10.1. Amended by Stats.1997, c. 949 (S.B.95), § 4; Stats.2001, c. 670 (S.B.445), § 1; Stats. 2002, c. 300 (A.B. 3035), § 3.5.); Stats. 2005, c. 188 (A.B. 780), § 1.)

11125.2. Appointment, employment or dismissal of public employees; closed sessions; public report

Any state body shall report publicly at a subsequent public meeting any action taken, and any rollcall vote thereon, to appoint, employ, or dismiss a public employee arising out of any closed session of the state body.

(Added by Stats.1980, c. 1284, p. 4335, § 9. Amended by Stats.1981, c. 968, p. 3687, § 10.3.)

11125.3. Action on items of business not appearing on agenda; notice

(a) Notwithstanding Section 11125, a state body may take action on items of business not appearing on the posted agenda under any of the conditions stated below:

(1) Upon a determination by a majority vote of the state body that an emergency situation exists, as defined in

Section 11125.5.

(2) Upon a determination by a two-thirds vote of the state body, or, if less than two-thirds of the members are present, a unanimous vote of those members present, that there exists a need to take immediate action and that the need for action came to the attention of the state body subsequent to the agenda being posted as specified in Section 11125.

(b) Notice of the additional item to be considered shall be provided to each member of the state body and to all parties that have requested notice of its meetings as soon as is practicable after a determination of the need to consider the item is made, but shall be delivered in a manner that allows it to be received by the members and by newspapers of general circulation and radio or television stations at least 48 hours before the time of the meeting specified in the notice. Notice shall be made available to newspapers of general circulation and radio or television stations by providing that notice to all national press wire services. Notice shall also be made available on the Internet as soon as is practicable after the decision to consider additional items at a meeting has been made.

(Added by Stats.1994, c. 1153 (A.B.3467), § 2. Amended by Stats.2001, c. 243 (A.B.192), § 9.)

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11125.4. Special meetings; authorized purposes; notice; required finding of hardship or need to protect public interest

(a) A special meeting may be called at any time by the presiding officer of the state body or by a majority of the members of the state body. A special meeting may only be called for one of the following purposes where compliance with the 10-day notice provisions of Section 11125 would impose a substantial hardship on the state body or where immediate action is required to protect the public interest:

(1) To consider "pending litigation" as that term is defined in subdivision (e) of Section 11126.

(2) To consider proposed legislation.

(3) To consider issuance of a legal opinion.

(4) To consider disciplinary action involving a state officer or employee.

(5) To consider the purchase, sale, exchange, or lease of real property.

(6) To consider license examinations and applications.

(7) To consider an action on a loan or grant provided pursuant to Division 31 (commencing with Section 50000) of the Health and Safety Code.

(8) To consider its response to a confidential final draft audit report as permitted by Section 11126.2.

(b) When a special meeting is called pursuant to one of the purposes specified in subdivision (a), the state body shall provide notice of the special meeting to each member of the state body and to all parties that have requested notice of its meetings as soon as is practicable after the decision to call a special meeting has been made, but shall deliver the notice in a manner that allows it to be received by the members and by newspapers of general circulation and radio or television stations at least 48 hours before the time of the special meeting specified in the notice. Notice shall be made available to newspapers of general circulation and radio or television stations by providing that notice to all national press wire services. Notice shall also be made available on the Internet within the time periods required by this section. The notice shall specify the time and place of the special meeting and the business to be transacted. The written notice shall additionally specify the address of the Internet Web site where notices required by this article are made available. No other business shall be considered at a special meeting by the state body. The written notice may be dispensed with as to any member who at or prior to the time the meeting convenes files with the clerk or secretary of the state body a written waiver of notice. The waiver may be given by telegram, facsimile transmission, or similar means. The

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written notice may also be dispensed with as to any member who is actually present at the meeting at the time it convenes. Notice shall be required pursuant to this section regardless of whether any action is taken at the special meeting.

(c) At the commencement of any special meeting, the state body must make a finding in open session that the delay necessitated by providing notice 10 days prior to a meeting as required by Section 11125 would cause a substantial hardship on the body or that immediate action is required to protect the public interest. The finding shall set forth the specific facts that constitute the hardship to the body or the impending harm to the public interest. The finding shall be adopted by a two-thirds vote of the body, or, if less than two-thirds of the members are present, a unanimous vote of those members present. The finding shall be made available on the Internet. Failure to adopt the finding terminates the meeting.

(Added by Stats.1997, c. 949 (S.B.95), § 5.
Amended by Stats.1999, c. 393 (A.B.1234), § 2;
Stats.2004, c. 576 (A.B.1827), § 1.)

11125.5. Emergency meetings

(a) In the case of an emergency situation involving matters upon which prompt action is necessary due to the disruption or threatened disruption of public facilities, a state body may hold an emergency meeting without complying with the 10-day notice requirement of Section 11125 or the 48-

hour notice requirement of Section 11125.4.

(b) For purposes of this section, "emergency situation" means any of the following, as determined by a majority of the members of the state body during a meeting prior to the emergency meeting, or at the beginning of the emergency meeting:

(1) Work stoppage or other activity that severely impairs public health or safety, or both.

(2) Crippling disaster that severely impairs public health or safety, or both.

(c) However, newspapers of general circulation and radio or television stations that have requested notice of meetings pursuant to Section 11125 shall be notified by the presiding officer of the state body, or a designee thereof, one hour prior to the emergency meeting by telephone. Notice shall also be made available on the Internet as soon as is practicable after the decision to call the emergency meeting has been made. If telephone services are not functioning, the notice requirements of this section shall be deemed waived, and the presiding officer of the state body, or a designee thereof, shall notify those newspapers, radio stations, or television stations of the fact of the holding of the emergency meeting, the purpose of the meeting, and any action taken at the meeting as soon after the meeting as possible.

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(d) The minutes of a meeting called pursuant to this section, a list of persons who the presiding officer of the state body, or a designee thereof, notified or attempted to notify, a copy of the rollcall vote, and any action taken at the meeting shall be posted for a minimum of 10 days in a public place, and also made available on the Internet for a minimum of 10 days, as soon after the meeting as possible.

(Amended by Stats.1992, c. 1312 (A.B.2912), § 11, eff. Sept. 30, 1992; Stats.1997, c. 949 (S.B.95), § 6; Stats.1999, c. 393 (A.B.1234), § 3.)

11125.6. Fish and Game Commission; emergency meetings; appeals of fishery closures or restrictions

(a) An emergency meeting may be called at any time by the president of the Fish and Game Commission or by a majority of the members of the commission to consider an appeal of a closure of or restriction in a fishery adopted pursuant to Section 7710 of the Fish and Game Code. In the case of an emergency situation involving matters upon which prompt action is necessary due to the disruption or threatened disruption of an established fishery, the commission may hold an emergency meeting without complying with the 10-day notice requirement of Section 11125 or the 48-hour notice requirement of Section 11125.4 if the delay necessitated by providing the 10-day notice of a public meeting required by Section 11125 or the 48-hour notice

required by Section 11125.4 would significantly adversely impact the economic benefits of a fishery to the participants in the fishery and to the people of the state or significantly adversely impact the sustainability of a fishery managed by the state.

(b) At the commencement of an emergency meeting called pursuant to this section, the commission shall make a finding in open session that the delay necessitated by providing notice 10 days prior to a meeting as required by Section 11125 or 48 hours prior to a meeting as required by Section 11125.4 would significantly adversely impact the economic benefits of a fishery to the participants in the fishery and to the people of the state or significantly adversely impact the sustainability of a fishery managed by the state. The finding shall set forth the specific facts that constitute the impact to the economic benefits of the fishery or the sustainability of the fishery. The finding shall be adopted by a vote of at least four members of the commission, or, if less than four of the members are present, a unanimous vote of those members present. Failure to adopt the finding shall terminate the meeting.

(c) Newspapers of general circulation and radio or television stations that have requested notice of meetings pursuant to Section 11125 shall be notified by the presiding officer of the commission, or a designee thereof, one hour prior to the emergency meeting by telephone.

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(d) The minutes of an emergency meeting called pursuant to this section, a list of persons who the president of the commission, or a designee thereof, notified or attempted to notify, a copy of the rollcall vote, and any action taken at the meeting shall be posted for a minimum of 10 days in a public place as soon after the meeting as possible.

(Added by Stats.1998, c. 1052 (A.B.1241), S 21.)

11125.7. Agenda item discussion before state body; opportunity for public address; regulation by state body; freedom of expression; application of provisions

(a) Except as otherwise provided in this section, the state body shall provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item. This section is not applicable if the agenda item has already been considered by a committee composed exclusively of members of the state body at a public meeting where interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the state body. Every notice for a special meeting at which action is proposed to be taken on an

item shall provide an opportunity for members of the public to directly address the state body concerning that item prior to action on the item. In addition, the notice requirement of Section 11125 shall not preclude the acceptance of testimony at meetings, other than emergency meetings, from members of the public, provided, however, that no action is taken by the state body at the same meeting on matters brought before the body by members of the public.

(b) The state body may adopt reasonable regulations to ensure that the intent of subdivision (a) is carried out, including, but not limited to, regulations limiting the total amount of time allocated for public comment on particular issues and for each individual speaker.

(c) The state body shall not prohibit public criticism of the policies, programs, or services of the state body, or of the acts or omissions of the state body. Nothing in this subdivision shall confer any privilege or protection for expression beyond that otherwise provided by law.

(d) This section is not applicable to closed sessions held pursuant to Section 11126.

(e) This section is not applicable to decisions regarding proceedings held pursuant to Chapter 5 (commencing with Section 11500), relating to administrative adjudication, or to the conduct of those proceedings.

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(f) This section is not applicable to hearings conducted by the State Board of Control pursuant to Sections 13963 and 13963.1.

(g) This section is not applicable to agenda items that involve decisions of the Public Utilities Commission regarding adjudicatory hearings held pursuant to Chapter 9 (commencing with Section 1701) of Part 1 of Division 1 of the Public Utilities Code. For all other agenda items, the commission shall provide members of the public, other than those who have already participated in the proceedings underlying the agenda item, an opportunity to directly address the commission before or during the commission's consideration of the item.

(Added by Stats.1993, c. 1289 (S.B.367), § 2. Amended by Stats.1995, c. 938 (S.B.523), § 13, operative July 1, 1997; Stats.1997, c. 949 (S.B.95), § 7.)

11125.8. Hearings to consider crimes against minors or crimes of sexual assault or domestic violence; identification of applicant; disclosure of nature of hearing

(a) Notwithstanding Section 11131.5, in any hearing that the State Board of Control conducts pursuant to Section 13963.1 and that the applicant or applicant's representative does not request be open to the public, no notice, agenda, announcement, or report required under this article need identify the applicant.

(b) In any hearing that the board conducts pursuant to Section 13963.1 and that the applicant or applicant's representative does not request be open to the public, the board shall disclose that the hearing is being held pursuant to Section 13963.1. That disclosure shall be deemed to satisfy the requirements of subdivision (a) of Section 11126.3.

(Added by Stats.1997, c. 949 (S.B.95), § 9.)

11125.9. Regional water quality control boards; compliance with notification guidelines

Regional water quality control boards shall comply with the notification guidelines in Section 11125 and, in addition, shall do both of the following:

(a) Notify, in writing, all clerks of the city councils and county boards of supervisors within the regional board's jurisdiction of any and all board hearings at least 10 days prior to the hearing. Notification shall include an agenda for the meeting with contents as described in subdivision (b) of Section 11125 as well as the name, address, and telephone number of any person who can provide further information prior to the meeting, but need not include a list of witnesses expected to appear at the meeting. Each clerk, upon receipt of the notification of a board hearing, shall distribute the notice to all members of the respective city council or board of supervisors within the regional board's jurisdiction.

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(b) Notify, in writing, all newspapers with a circulation rate of at least 10,000 within the regional board's jurisdiction of any and all board hearings, at least 10 days prior to the hearing. Notification shall include an agenda for the meeting with contents as described in subdivision (b) of Section 11125 as well as the name, address, and telephone number of any person who can provide further information prior to the meeting, but need not include a list of witnesses expected to appear at the meeting.

(Added by Stats.1997, c. 301 (A.B.116), § 1.)

11126. Closed sessions

(a)(1) Nothing in this article shall be construed to prevent a state body from holding closed sessions during a regular or special meeting to consider the appointment, employment, evaluation of performance, or dismissal of a public employee or to hear complaints or charges brought against that employee by another person or employee unless the employee requests a public hearing.

(2) As a condition to holding a closed session on the complaints or charges to consider disciplinary action or to consider dismissal, the employee shall be given written notice of his or her right to have a public hearing, rather than a closed session, and that notice shall be delivered to the employee personally or by mail at least 24 hours before the time for holding a regular or special meeting. If notice is not given,

any disciplinary or other action taken against any employee at the closed session shall be null and void.

(3) The state body also may exclude from any public or closed session, during the examination of a witness, any or all other witnesses in the matter being investigated by the state body.

(4) Following the public hearing or closed session, the body may deliberate on the decision to be reached in a closed session.

(b) For the purposes of this section, "employee" does not include any person who is elected to, or appointed to a public office by, any state body. However, officers of the California State University who receive compensation for their services, other than per diem and ordinary and necessary expenses, shall, when engaged in that capacity, be considered employees. Furthermore, for purposes of this section, the term employee includes a person exempt from civil service pursuant to subdivision (e) of Section 4 of Article VII of the California Constitution.

(c) Nothing in this article shall be construed to do any of the following:

(1) Prevent state bodies that administer the licensing of persons engaging in businesses or professions from holding closed sessions to prepare, approve, grade, or administer examinations.

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(2) Prevent an advisory body of a state body that administers the licensing of persons engaged in businesses or professions from conducting a closed session to discuss matters that the advisory body has found would constitute an unwarranted invasion of the privacy of an individual licensee or applicant if discussed in an open meeting, provided the advisory body does not include a quorum of the members of the state body it advises. Those matters may include review of an applicant's qualifications for licensure and an inquiry specifically related to the state body's enforcement program concerning an individual licensee or applicant where the inquiry occurs prior to the filing of a civil, criminal, or administrative disciplinary action against the licensee or applicant by the state body.

(3) Prohibit a state body from holding a closed session to deliberate on a decision to be reached in a proceeding required to be conducted pursuant to Chapter 5 (commencing with Section 11500) or similar provisions of law.

(4) Grant a right to enter any correctional institution or the grounds of a correctional institution where that right is not otherwise granted by law, nor shall anything in this article be construed to prevent a state body from holding a closed session when considering and acting upon the determination of a term, parole, or release of any individual or other disposition of an individual case,

or if public disclosure of the subjects under discussion or consideration is expressly prohibited by statute.

(5) Prevent any closed session to consider the conferring of honorary degrees, or gifts, donations, and bequests that the donor or proposed donor has requested in writing to be kept confidential.

(6) Prevent the Alcoholic Beverage Control Appeals Board from holding a closed session for the purpose of holding a deliberative conference as provided in Section 11125.

(7)(A) Prevent a state body from holding closed sessions with its negotiator prior to the purchase, sale, exchange, or lease of real property by or for the state body to give instructions to its negotiator regarding the price and terms of payment for the purchase, sale, exchange, or lease.

(B) However, prior to the closed session, the state body shall hold an open and public session in which it identifies the real property or real properties that the negotiations may concern and the person or persons with whom its negotiator may negotiate.

(C) For purposes of this paragraph, the negotiator may be a member of the state body.

(D) For purposes of this paragraph, "lease" includes renewal or renegotiation of a lease.

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(E) Nothing in this paragraph shall preclude a state body from holding a closed session for discussions regarding eminent domain proceedings pursuant to subdivision (e).

(8) Prevent the California Postsecondary Education Commission from holding closed sessions to consider matters pertaining to the appointment or termination of the Director of the California Postsecondary Education Commission.

(9) Prevent the Council for Private Postsecondary and Vocational Education from holding closed sessions to consider matters pertaining to the appointment or termination of the Executive Director of the Council for Private Postsecondary and Vocational Education.

(10) Prevent the Franchise Tax Board from holding closed sessions for the purpose of discussion of confidential tax returns or information the public disclosure of which is prohibited by law, or from considering matters pertaining to the appointment or removal of the Executive Officer of the Franchise Tax Board.

(11) Require the Franchise Tax Board to notice or disclose any confidential tax information considered in closed sessions, or documents executed in connection therewith, the public disclosure of which is prohibited pursuant to Article 2 (commencing with Section 19542) of Chapter 7 of Part 10.2 of the Revenue and Taxation Code.

(12) Prevent the Board of Corrections from holding closed sessions when considering reports of crime conditions under Section 6027 of the Penal Code.

(13) Prevent the State Air Resources Board from holding closed sessions when considering the proprietary specifications and performance data of manufacturers.

(14) Prevent the State Board of Education or the Superintendent of Public Instruction, or any committee advising the board or the superintendent, from holding closed sessions on those portions of its review of assessment instruments pursuant to Chapter 5 (commencing with Section 60600) of, or pursuant to Chapter 8 (commencing with Section 60850) of, Part 33 of the Education Code during which actual test content is reviewed and discussed. The purpose of this provision is to maintain the confidentiality of the assessments under review.

(15) Prevent the California Integrated Waste Management Board or its auxiliary committees from holding closed sessions for the purpose of discussing confidential tax returns, discussing trade secrets or confidential or proprietary information in its possession, or discussing other data, the public disclosure of which is prohibited by law.

(16) Prevent a state body that

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invests retirement, pension, or endowment funds from holding closed sessions when considering investment decisions. For purposes of consideration of shareholder voting on corporate stocks held by the state body, closed sessions for the purposes of voting may be held only with respect to election of corporate directors, election of independent auditors, and other financial issues that could have a material effect on the net income of the corporation. For the purpose of real property investment decisions that may be considered in a closed session pursuant to this paragraph, a state body shall also be exempt from the provisions of paragraph (7) relating to the identification of real properties prior to the closed session.

(17) Prevent a state body, or boards, commissions, administrative officers, or other representatives that may properly be designated by law or by a state body, from holding closed sessions with its representatives in discharging its responsibilities under Chapter 10 (commencing with Section 3500), Chapter 10.3 (commencing with Section 3512), Chapter 10.5 (commencing with Section 3525), or Chapter 10.7 (commencing of Section 3540) of Division 4 of Title 1 as the sessions relate to salaries, salary schedules, or compensation paid in the form of fringe benefits. For the purposes enumerated in the preceding sentence, a state body may also meet with a state conciliator who has intervened in the proceedings.

(18)(A) Prevent a state body from holding closed sessions to consider matters posing a threat or potential threat of criminal or terrorist activity against the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the state body, where disclosure of these considerations could compromise or impede the safety or security of the personnel, property, buildings, facilities, or equipment, including electronic data, owned, leased, or controlled by the state body.

(B) Notwithstanding any other provision of law, a state body, at any regular or special meeting, may meet in a closed session pursuant to subparagraph (A) upon a two-thirds vote of the members present at the meeting.

(C) After meeting in closed session pursuant to subparagraph (A), the state body shall reconvene in open session prior to adjournment and report that a closed session was held pursuant to subparagraph (A), the general nature of the matters considered, and whether any action was taken in closed session.

(D) After meeting in closed session pursuant to subparagraph (A), the state body shall submit to the Legislative Analyst written notification stating that it held this closed session, the general reason or reasons for the closed session, the general nature of the matters considered, and whether any action was taken in closed session. The Legislative Analyst shall retain for no less than four years any written

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notification received from a state body pursuant to this subparagraph.

(d)(1) Notwithstanding any other provision of law, any meeting of the Public Utilities Commission at which the rates of entities under the commission's jurisdiction are changed shall be open and public.

(2) Nothing in this article shall be construed to prevent the Public Utilities Commission from holding closed sessions to deliberate on the institution of proceedings, or disciplinary actions against any person or entity under the jurisdiction of the commission.

(e)(1) Nothing in this article shall be construed to prevent a state body, based on the advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation.

(2) For purposes of this article, all expressions of the lawyer-client privilege other than those provided in this subdivision are hereby abrogated. This subdivision is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings pursuant to this article. For purposes of this subdivision, litigation shall be considered pending when any of the following circumstances exist:

(A) An adjudicatory proceeding

before a court, an administrative body exercising its adjudicatory authority, a hearing officer, or an arbitrator, to which the state body is a party, has been initiated formally.

(B)(i) A point has been reached where, in the opinion of the state body on the advice of its legal counsel, based on existing facts and circumstances, there is a significant exposure to litigation against the state body.

(ii) Based on existing facts and circumstances, the state body is meeting only to decide whether a closed session is authorized pursuant to clause (i).

(C)(i) Based on existing facts and circumstances, the state body has decided to initiate or is deciding whether to initiate litigation.

(ii) The legal counsel of the state body shall prepare and submit to it a memorandum stating the specific reasons and legal authority for the closed session. If the closed session is pursuant to paragraph (1), the memorandum shall include the title of the litigation. If the closed session is pursuant to subparagraph (A) or (B), the memorandum shall include the existing facts and circumstances on which it is based. The legal counsel shall submit the memorandum to the state body prior to the closed session, if feasible, and in any case no later than one week after the closed session. The memorandum shall be exempt from disclosure pursuant to Section 6254.25.

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(iii) For purposes of this subdivision, "litigation" includes any adjudicatory proceeding, including eminent domain, before a court, administrative body exercising its adjudicatory authority, hearing officer, or arbitrator.

(iv) Disclosure of a memorandum required under this subdivision shall not be deemed as a waiver of the lawyer-client privilege, as provided for under Article 3 (commencing with Section 950) of Chapter 4 of Division 8 of the Evidence Code.

(f) In addition to subdivisions (a), (b), and (c), nothing in this article shall be construed to do any of the following:

(1) Prevent a state body operating under a joint powers agreement for insurance pooling from holding a closed session to discuss a claim for the payment of tort liability or public liability losses incurred by the state body or any member agency under the joint powers agreement.

(2) Prevent the examining committee established by the State Board of Forestry and Fire Protection, pursuant to Section 763 of the Public Resources Code, from conducting a closed session to consider disciplinary action against an individual professional forester prior to the filing of an accusation against the forester pursuant to Section 11503.

(3) Prevent an administrative

committee established by the California Board of Accountancy pursuant to Section 5020 of the Business and Professions Code from conducting a closed session to consider disciplinary action against an individual accountant prior to the filing of an accusation against the accountant pursuant to Section 11503. Nothing in this article shall be construed to prevent an examining committee established by the California Board of Accountancy pursuant to Section 5023 of the Business and Professions Code from conducting a closed hearing to interview an individual applicant or accountant regarding the applicant's qualifications.

(4) Prevent a state body, as defined in subdivision (b) of Section 11121, from conducting a closed session to consider any matter that properly could be considered in closed session by the state body whose authority it exercises.

(5) Prevent a state body, as defined in subdivision (d) of Section 11121, from conducting a closed session to consider any matter that properly could be considered in a closed session by the body defined as a state body pursuant to subdivision (a) or (b) of Section 11121.

(6) Prevent a state body, as defined in subdivision (c) of Section 11121, from conducting a closed session to consider any matter that properly could be considered in a closed session by the state body it advises.

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(7) Prevent the State Board of Equalization from holding closed sessions for either of the following:

(A) When considering matters pertaining to the appointment or removal of the Executive Secretary of the State Board of Equalization.

(B) For the purpose of hearing confidential taxpayer appeals or data, the public disclosure of which is prohibited by law.

(8) Require the State Board of Equalization to disclose any action taken in closed session or documents executed in connection with that action, the public disclosure of which is prohibited by law pursuant to Sections 15619 and 15641 of this code and Sections 833, 7056, 8255, 9255, 11655, 30455, 32455, 38705, 38706, 43651, 45982, 46751, 50159, 55381, and 60609 of the Revenue and Taxation Code.

(9) Prevent the California Earthquake Prediction Evaluation Council, or other body appointed to advise the Director of the Office of Emergency Services or the Governor concerning matters relating to volcanic or earthquake predictions, from holding closed sessions when considering the evaluation of possible predictions.

(g) This article does not prevent either of the following:

(1) The Teachers' Retirement Board or the Board of Administration of

the Public Employees' Retirement System from holding closed sessions when considering matters pertaining to the recruitment, appointment, employment, or removal of the chief executive officer or when considering matters pertaining to the recruitment or removal of the Chief Investment Officer of the State Teachers' Retirement System or the Public Employees' Retirement System.

(2) The Commission on Teacher Credentialing from holding closed sessions when considering matters relating to the recruitment, appointment, or removal of its executive director.

(h) This article does not prevent the Board of Administration of the Public Employees' Retirement System from holding closed sessions when considering matters relating to the development of rates and competitive strategy for plans offered pursuant to Chapter 15 (commencing with Section 21660) of Part 3 of Division 5 of Title 2.

(Amended by Stats.1992, c. 1050 (A.B.2987), § 17; Stats.1994, c. 26 (A.B.1807), § 230, eff. March 30, 1994; Stats.1994, c. 422 (A.B.2589), § 15.5, eff. Sept. 7, 1994; Stats.1994, c. 845 (S.B.1316), § 1; Stats.1995, c. 975 (A.B.265), § 3; Stats.1996, c. 1041 (A.B.3358), § 2; Stats.1997, c. 949 (S.B.95), § 8; Stats.1998, c. 210 (S.B.2008), § 1; Stats.1998, c. 972 (S.B.989), § 1; Stats.1999, c. 735 (S.B.366), § 9, eff. Oct. 10, 1999; Stats.2000, c. 1002 (S.B.1998), § 1; Stats.2000, c. 1055 (A.B.2889), § 30, eff. Sept. 30, 2000; Stats.2001, c. 21 (S.B.54), § 1, eff. June 25, 2001; Stats.2001, c. 243 (A.B.192), § 10.; Stats. 2002, c. 664 (A.B. 3034), § 93.7; Stats. 2002, c. 1113 (A.B. 2072), § 1.); Stats. 2005, c. 288 (A.B. 277), § 1.)

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11126.1. Record of topics discussed and decisions made at closed sessions; availability

The state body shall designate a clerk or other officer or employee of the state body, who shall then attend each closed session of the state body and keep and enter in a minute book a record of topics discussed and decisions made at the meeting. The minute book made pursuant to this section is not a public record subject to inspection pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1), and shall be kept confidential. The minute book shall be available to members of the state body or, if a violation of this chapter is alleged to have occurred at a closed session, to a court of general jurisdiction. Such minute book may, but need not, consist of a recording of the closed session.

(Added by Stats.1980, c. 1284, p. 4340, § 12.
Amended by Stats.1981, c. 968, p. 3691, § 13.)

11126.2. Closed session; response to confidential final draft audit report; public release of report

(a) Nothing in this article shall be construed to prohibit a state body that has received a confidential final draft audit report from the Bureau of State Audits from holding closed sessions to discuss its response to that report.

(b) After the public release of an audit report by the Bureau of State

Audits, if a state body meets to discuss the audit report, it shall do so in an open session unless exempted from that requirement by some other provision of law.

(Added by Stats.2004, c. 576 (A.B.1827), § 2.)

11126.3. Disclosure of nature of items to be discussed in closed session; scope of session; notice of meeting; announcement of pending litigation; unnecessary disclosures; disclosures at open session following closed session

(a) Prior to holding any closed session, the state body shall disclose, in an open meeting, the general nature of the item or items to be discussed in the closed session. The disclosure may take the form of a reference to the item or items as they are listed by number or letter on the agenda. If the session is closed pursuant to paragraph (2) of subdivision (d) of Section 11126, the state body shall state the title of, or otherwise specifically identify, the proceeding or disciplinary action contemplated. However, should the body determine that to do so would jeopardize the body's ability to effectuate service of process upon one or more unserved parties if the proceeding or disciplinary action is commenced or that to do so would fail to protect the private economic and business reputation of the person or entity if the proceeding or disciplinary action is not commenced, then the state body shall notice that there will be a

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closed session and describe in general terms the purpose of that session. If the session is closed pursuant to subparagraph (A) of paragraph (2) of subdivision (e) of Section 11126, the state body shall state the title of, or otherwise specifically identify, the litigation to be discussed unless the body states that to do so would jeopardize the body's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage.

(b) In the closed session, the state body may consider only those matters covered in its disclosure.

(c) The disclosure shall be made as part of the notice provided for the meeting pursuant to Section 11125 or pursuant to subdivision (a) of Section 92032 of the Education Code and of any order or notice required by Section 11129.

(d) If, after the agenda has been published in compliance with this article, any pending litigation (under subdivision (e) of Section 11126) matters arise, the postponement of which will prevent the state body from complying with any statutory, court-ordered, or other legally imposed deadline, the state body may proceed to discuss those matters in closed session and shall publicly announce in the meeting the title of, or otherwise specifically identify, the litigation to be discussed, unless the body states that to do so would

jeopardize the body's ability to effectuate service of process upon one or more unserved parties, or that to do so would jeopardize its ability to conclude existing settlement negotiations to its advantage. Such an announcement shall be deemed to comply fully with the requirements of this section.

(e) Nothing in this section shall require or authorize a disclosure of names or other information that would constitute an invasion of privacy or otherwise unnecessarily divulge the particular facts concerning the closed session or the disclosure of which is prohibited by state or federal law.

(f) After any closed session, the state body shall reconvene into open session prior to adjournment and shall make any reports, provide any documentation, and make any other disclosures required by Section 11125.2 of action taken in the closed session.

(g) The announcements required to be made in open session pursuant to this section may be made at the location announced in the agenda for the closed session, as long as the public is allowed to be present at that location for the purpose of hearing the announcement.

(Added by Stats.1980, c. 1284, p. 4341, § 13. Amended by Stats.1981, c. 968, p. 3692, § 14; Stats.1987, c. 1320, § 3. Amended by Stats.1997, c. 949 (S.B.95), § 10; Stats.1998, c. 210 (S.B.2008), § 2; Stats.2001, c. 243 (A.B.192), § 11.)

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11126.5. Disorderly conduct of general public during meeting; clearing of room

In the event that any meeting is willfully interrupted by a group or groups of persons so as to render the orderly conduct of such meeting unfeasible and order cannot be restored by the removal of individuals who are willfully interrupting the meeting the state body conducting the meeting may order the meeting room cleared and continue in session. Nothing in this section shall prohibit the state body from establishing a procedure for readmitting an individual or individuals not responsible for willfully disturbing the orderly conduct of the meeting. Notwithstanding any other provision of law, only matters appearing on the agenda may be considered in such a session. Representatives of the press or other news media, except those participating in the disturbance, shall be allowed to attend any session held pursuant to this section.

(Added by Stats.1970, c. 1610, p. 3385, § 1.
Amended by Stats.1981, c. 968, p. 3692, § 15.)

11126.7. Fees

No fees may be charged by a state body for providing a notice required by Section 11125 or for carrying out any provision of this article, except as specifically authorized pursuant to this article.

(Added by Stats.1980, c. 1284, p. 4341, § 14.
Amended by Stats.1981, c. 968, p. 3692, § 16.)

11127. Application of article

Each provision of this article shall apply to every state body unless the body is specifically excepted from that provision by law or is covered by any other conflicting provision of law.

(Added by Stats.1967, c. 1656, p. 4026, § 122.
Amended by Stats.1981, c. 968, p. 3692, § 17.)

11128. Time of closed session

Each closed session of a state body shall be held only during a regular or special meeting of the body.

(Added by Stats.1967, c. 1656, p. 4026, § 122.
Amended by Stats.1980, c. 1284, p. 4341, § 15;
Stats.1981, c. 968, p. 3692, § 18.)

11128.5. Adjournment; declaration; notice; hour for reconvened meeting

The state body may adjourn any regular, adjourned regular, special, or adjourned special meeting to a time and place specified in the order of adjournment. Less than a quorum may so adjourn from time to time. If all members are absent from any regular or adjourned regular meeting, the clerk or secretary of the state body may declare the meeting adjourned to a stated time and place and he or she shall cause a written notice of the adjournment to be given in the same manner as provided in Section 11125.4 for special meetings, unless that notice is waived as provided

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for special meetings. A copy of the order or notice of adjournment shall be conspicuously posted on or near the door of the place where the regular, adjourned regular, special, or adjourned special meeting was held within 24 hours after the time of the adjournment. When a regular or adjourned regular meeting is adjourned as provided in this section, the resulting adjourned regular meeting is a regular meeting for all purposes. When an order of adjournment of any meeting fails to state the hour at which the adjourned meeting is to be held, it shall be held at the hour specified for regular meetings by law or regulation.

(Added by Stats.1997, c. 949 (S.B.95), § 11.)

11129. Continuance; posting notice

Any hearing being held, or noticed or ordered to be held by a state body at any meeting may by order or notice of continuance be continued or recontinued to any subsequent meeting of the state body in the same manner and to the same extent set forth in Section 11128.5 for the adjournment of meetings. A copy of the order or notice of continuance shall be conspicuously posted on or near the door of the place where the hearing was held within 24 hours after the time of the continuance; provided, that if the hearing is continued to a time less than 24 hours after the time specified in the order or notice of hearing, a copy of the order or notice of continuance of hearing shall be posted

immediately following the meeting at which the order or declaration of continuance was adopted or made.

(Added by Stats.1967, c. 1656, p. 4026, § 122.
Amended by Stats.1981, c. 968, p. 3692, § 19.
Amended by Stats.1997, c. 949 (S.B.95), § 12.)

11130. Actions to prevent violations or determine applicability of article; validity of rules discouraging expression; taping of closed sessions; discovery procedures for tapes

(a) The Attorney General, the district attorney, or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this article or to determine the applicability of this article to past actions or threatened future action by members of the state body or to determine whether any rule or action by the state body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, or to compel the state body to tape record its closed sessions as hereinafter provided.

(b) The court in its discretion may, upon a judgment of a violation of Section 11126, order the state body to tape record its closed sessions and preserve the tape recordings for the period and under the terms of security and confidentiality the court deems appropriate.

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(c)(1) Each recording so kept shall be immediately labeled with the date of the closed session recorded and the title of the clerk or other officer who shall be custodian of the recording.

(2) The tapes shall be subject to the following discovery procedures:

(A) In any case in which discovery or disclosure of the tape is sought by the Attorney General, the district attorney, or the plaintiff in a civil action pursuant to this section or Section 11130.3 alleging that a violation of this article has occurred in a closed session that has been recorded pursuant to this section, the party seeking discovery or disclosure shall file a written notice of motion with the appropriate court with notice to the governmental agency that has custody and control of the tape recording. The notice shall be given pursuant to subdivision (b) of Section 1005 of the Code of Civil Procedure.

(B) The notice shall include, in addition to the items required by Section 1010 of the Code of Civil Procedure, all of the following:

(i) Identification of the proceeding in which discovery or disclosure is sought, the party seeking discovery or disclosure, the date and time of the meeting recorded, and the governmental agency that has custody and control of the recording.

(ii) An affidavit that contains specific facts indicating that a violation of the act occurred in the closed session.

(3) If the court, following a review of the motion, finds that there is good cause to believe that a violation has occurred, the court may review, in camera, the recording of that portion of the closed session alleged to have violated the act.

(4) If, following the in-camera review, the court concludes that disclosure of a portion of the recording would be likely to materially assist in the resolution of the litigation alleging violation of this article, the court shall, in its discretion, make a certified transcript of the portion of the recording a public exhibit in the proceeding.

(5) Nothing in this section shall permit discovery of communications that are protected by the attorney-client privilege.

(Amended by Stats.1997, c. 949 (S.B.95), § 13; Stats.1999, c. 393 (A.B.1234), § 4.)

11130.3. Judicial determination action by state body in violation of §§ 11123 or 11125 null and void; action by interested person; grounds

(a) Any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of obtaining a judicial determination that an action taken by a state body in violation of Section 11123 or 11125 is null and void under this

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section. Any action seeking such a judicial determination shall be commenced within 90 days from the date the action was taken. Nothing in this section shall be construed to prevent a state body from curing or correcting an action challenged pursuant to this section.

(b) An action shall not be determined to be null and void if any of the following conditions exist:

(1) The action taken was in connection with the sale or issuance of notes, bonds, or other evidences of indebtedness or any contract, instrument, or agreement related thereto.

(2) The action taken gave rise to a contractual obligation upon which a party has, in good faith, detrimentally relied.

(3) The action taken was in substantial compliance with Sections 11123 and 11125.

(4) The action taken was in connection with the collection of any tax.

(Amended by Stats.1999, c. 393 (A.B.1234), § 5.)

11130.5. Court costs and attorney fees

A court may award court costs and reasonable attorney's fees to the plaintiff in an action brought pursuant to Section 11130 or 11130.3 where it is found that a state body has violated the provisions of this article. The costs and fees shall be paid by the state body and shall not become a personal liability of any public officer or employee thereof.

A court may award court costs and reasonable attorney's fees to a defendant in any action brought pursuant to Section 11130 or 11130.3 where the defendant has prevailed in a final determination of the action and the court finds that the action was clearly frivolous and totally lacking in merit.

(Added by Stats.1975, c. 959, p. 2240, . 6.
Amended by Stats.1981, c. 968, p. 3693, . 21;
Stats.1985, c. 936, . 2.)

11130.7. Violations; misdemeanor

Each member of a state body who attends a meeting of that body in violation of any provision of this article, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this article, is guilty of a misdemeanor.

(Added by Stats.1980, c. 1284, p. 4341, § 16.
Amended by Stats.1981, c. 968, p. 3693, § 22.
Amended by Stats.1997, c. 949 (S.B.95), § 14.)

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11131. Use of facility allowing discrimination; state agency

No state agency shall conduct any meeting, conference, or other function in any facility that prohibits the admittance of any person, or persons, on the basis of race, religious creed, color, national origin, ancestry, or sex, or that is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase. As used in this section, "state agency" means and includes every state body, office, officer, department, division, bureau, board, council, commission, or other state agency.

(Added by Stats.1970, c. 383, p. 798, § 1.
Amended by Stats.1981, c. 968, p. 3693, § 23.
Amended by Stats.1997, c. 949 (S.B.95), § 15.)

11131.5. Identity of victims or alleged victims of crimes, tortious sexual conduct, or child abuse; public disclosure

No notice, agenda, announcement, or report required under this article need identify any victim or alleged victim of crime, tortious sexual conduct, or child abuse unless the identity of the person has been publicly disclosed.

(Added by Stats.1997, c. 949 (S.B.95), § 16.)

11132. Closed session by state body prohibited

Except as expressly authorized by this article, no closed session may be held by any state body.

(Added by Stats.1987, c. 1320, § 4.)



Ethics

- “Always do right. This will gratify some people and astonish the rest.” Mark Twain
- Ethics is well-based standards on what is right and what is wrong.
- Ethics is study and development of one’s ethical standards.

Ethics Training

- Excellent way to study standards of what is right and what is wrong.
- Must take within six months after assuming office
- Every two years thereafter

How to Obtain Training

- Internet Based
- Interactive Video
- CD-ROM

How to Obtain Training (2)

- Read DCA's "Incompatible Work Activity"
- Signed Certificate of Completion.
- Join the list of those who have completed the course.

Ethics-Review of Four Areas

- Political Reform Act requires disclosure of economic interests which could be affected by your official action. Requires disqualification if your official action may substantially impact a financial interest.

Ethics-Review of Five Areas

- Common Law Conflict of Interest either requires disclosure or disqualification or both if a non-financial personal interest may be affected by your official action.
- The Department's Incompatible Work Activities Policy prohibits you from engaging or giving the appearance that you are engaging in certain incompatible work activities.

Ethics-Review of Four Areas

- Gov Code section 1090 prohibits board members from having an interest in contracts negotiated by their boards.

The Political Reform Act

- Govt Code 81001.find and declare as follows:
- (a) State and local **government** should serve the needs and respond to the wishes of all citizens equally, without regard to their wealth;

Political Reform Act (2)

- (b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them

Political Reform Act (3)

- Govt. Code section 81002. The people enact this title to accomplish the following purposes...:(c) Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided.

Disclosure and Participation

- Disclosure of economic interests which could be affected by official action..
- Should not participate in official action which impacts a financial interest

Disclosure of Economic Interests on Form 700

- Purpose to prevent biases, actual and apparent which result from the financial interests of decision-makers.
- Must be filed
 - 30 Days of Assuming Office
 - Annual Basis
 - Penalty of \$10.00 per day for late filing.

Disclosure Categories--Requires Disclosure of Only Those Economic Interests Which Could Be Affected by Official Actions

- 7-Business Entity or Profession Regulated by Board
- 9-Economic Interest has done business with board
- 11-Economic Interest or professional association whose members are regulated by the board.

Economic Interests Which Must Be Disclosed

- Personal finances of public official or of his/her immediate family.
- Business entity in which the official or a member of his/her immediate family has an investment of \$2,000 or more
- Business entity in which the official is a director, officer, partner, trustee, employee, or holds any position of management

Economic Interest

- Real property in which the official or a member of his or her immediate family has an interest worth \$2,000 or more

Economic Interest

- Sources of income (other than loans by a commercial lending institution) aggregating \$500 or more, received or promised to the official within 12 months prior to the time the decision is made
- Sources of a gift or gifts valued at \$340 or more received by, or promised to the official, within 12 months prior to the time the decision is made.

Cannot Vote if Financial Interest Will Be Affected

- Includes those which are not disclosed on Form 700

Exceptions:

- “Public Generally”--Significant segment of jurisdiction feels significant impact similar to yours and persons appointed to the board or commission are appointed to represent and further the interests of the specific economic interest. (2 CCR§ 18707.4(a)(1))

Exceptions

- “Legally required to participate”--”unless there exists no alternative source of decision consistent with the purposes and terms of the statute authorizing the decision. (2 CCR§ 18708(a)) . Must take the steps outlined in the regulation.

2. Common Law Conflict of Interest

- Prohibits a public officer from placing themselves in a position in which personal interest may come in conflict with the public interest.
- Public Officers cannot place themselves in a position in which they may be tempted to disregard the public interest for their personal interest.
- See also FARB Model Code of Conduct

3. Incompatible Activities (Govt. Code § 19990)-1

- A state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible, in conflict with, or inimical to his or her duties as a state officer or employee.

Incompatible Activities (Govt. Code § 19990) -2

- Using the prestige or influence of the State or the appointing power for private gain or the private gain of another.

Incompatible Work Activity-5

- Receiving or accepting, directly or indirectly, any gift, including money, any service, gratuity, favor, entertainment, hospitality, loan, or any other thing of value from anyone who is doing or is seeking to do business of any kind with the State or whose activities are regulated or controlled in any way by the State, under circumstances from which it reasonably could be inferred that the gift was intended to influence the officer's official duties or was intended as a reward for any official action.

Using Prestige of Office

- Teaching a seminar--"Secrets of Avoiding Prosecution Under the Act" taught by John Que, Board Member, California Board of Trapeze Artists
- Seminar--"Best Swinging Practices" Joan Tee LTP. Ph.D, Professor of Trapezing, CSU, and Board Member, California BOTA

Using Prestige of Office

- Website-"John Que Appointed as Board Member"
- Best Practice-Avoid any action which could be construed that you are using the prestige of the office for personal gain.

Using Confidential Info

- Telling good friend about that the agency does not have the monies to prosecute so go ahead and violate the law.

Other Problem Areas

- Lobbying of board members outside of public meeting.

GIFTS

- Rationale for prohibition
- Limitation of \$360.00 from a single source if required to report the receipt of that gift from that source on Form 700.
- Disqualification from acting if will affect source of gift from which you receive \$360.00 or more within the last 12 months.
- Required to report Gifts of \$50.00 or more.

Gift Exceptions

- Gifts to An Agency
- Tickets Given to the Agency
- Tickets Given to the Official For Ceremonial Function
- Informational Materials
 - Tours
 - On-site demonstrations
 - Conference Fees
 - Passes or Tickets

Gifts of Travel are not reportable if

- Related to a legislative or governmental purpose
- For Speech--Public Address, oration, and includes participation on a panel, seminar or debate.
- However, payments for interstate transportation are reportable as either gift or income.

Govt Code Section § 1090

- Felony for violation
- Prohibition against board making a contract in which a board member has an interest.
- Board members are conclusively presumed to have participated in a contract even if he or she recuses from participation.

Govt Code Section § 1090

- Chapman Case--Port commission member pled to one felony count of violating Section 1090 even though he was advised by port commission attorney that he did not violate Section 1090 if he recused himself from participating in discussions. .

Hypo

- Kathy appears before the Board to have her show approved. Jane is: (1) Your significant other (2) Your cousin. (3) Your next door neighbor.

Hypo

- The National Association of Boards of Trapeze Artists (NATAB) has offered to pay for your lodging, meals, and transportation to accept an award on behalf of the California Trapeze Board. Your employer, Cheetah's School of Trapeze Artists, a school licensed by the California Board of Trapeze Artists (BOTA), has offered to pay your lodging, meals, and transportation.

Hypo

- Janis appears before the Board to urge the Board that Trapeze Artists Shows with five or less artists be exempt from the requirement that a physician be present. Your show has four trapeze artists.

Conclusion

- The PRA requires that government decisions be made with the public interest primarily in mind, and not with the government official's economic interest.
- Incompatible activity policy enumerates activities which prohibits the use of the state office for private gain.
- Take the Ethics Orientation Class. We keep a list who takes the class.



Resources

Order the Office of Attorney General's "Conflict of Interest" handbook:

www.caag.state.ca.us/publications/

For the publications of the Fair Political Practices Commission: www.fppc.ca.gov

EEO Office INTRANET web page address for DCA policies and other related information. The address is: <http://inside.dca.ca.gov/eo/>

DEPARTMENT OF CONSUMER AFFAIRS CONFLICT OF INTEREST CODE

Proposition 8, The Political Reform Act of 1974

Proposition 9 was a voter-approved initiative that, among other things, prohibits public officials from decision-making or participation when they have a financial conflict of interest. It also required each state agency to adopt a conflict of interest code, which the Department of Consumer Affairs has done. The conflict of interest code requires certain financial disclosures by designated employees, in addition to requiring disqualification where a financial conflict exists.

Financial Disclosure

Designated Employees

The Conflict of Interest Code is required to contain several things, the first of which is a list of “designated employees”. Designated employees are essentially those persons who are in policy-making or policy-formulating positions. Obvious examples are the Department Director, Chief Deputy Director and Deputy Directors, Policy Chiefs, licensing Board Members and Executive Officers or the boards. A complete list of designated employees is contained in the Department’s Conflict of Interest Code.

Designated employees are required to file initial, annual, and leaving office financial disclosure statements. This is done on Form 700, developed by the Fair Political Practices Commission (FPPC).

The Department of Consumer Affairs coordinates the filing of Form 700s for all designated employees. The form and instructional materials are distributed to such employees at the time they become designated employees for the initial statements, and at the time of leaving office for the leaving office statements. Packets for the annual filing are distributed early in the year so required filers can meet the final filing date of April 1.

Disclosure Categories

The Conflict of Interest Code also contains a list of “disclosure categories”. The disclosure categories are specific financial interests or business positions that must be reported by designated employees. Disclosure categories have been narrowly drafted to require disclosure of only those financial interests that could be affected by the particular designated employee. It is crucially important that designated employees report any and all financial interests within their disclosure categories. Designated employees do not have discretion whether to report financial interests within the categories. They must be reported.

Disqualification

Proposition 9 also prohibits any public official from making, participating in making, or attempting to influence a decision when the public official has a financial interest in the decision. “Public official” is broadly defined to include every member, officer, employee or consultant of a state agency. Thus, it extends to persons who are not designated employees.

It is also important to remember that the law prohibits participating in making, or attempting to influence, a decision in which the public official has a financial interest. Thus, a public official cannot “lobby” other members regarding the decision, and merely refrain from voting on the decision to be made. There can be no involvement in the decision or decision-making process.

The Fair Political Practices Commission has adopted extensive regulations to implement the statutes requiring disqualification of public officials. Each potential conflict of interest situation must be examined and analyzed on its particular facts. Because the law and regulations in this area are very complex, it is suggested that public officials in the Department of Consumer Affairs take the following practical approach. On a decision that comes before you, ask yourself this question:

“Would the decision in the matter have any financial effect on me, my family, my business, my job, or my employer, or on any entity from which I’ve received a gift or income?”

If the answer to the question is “yes”, then you should consult the Fair Political Practices Commission or the Department of Consumer Affairs Legal Office for guidance and a determination as to whether disqualification is required.

If disqualification were required, the financial interest would be officially noted for the record. The public official would then be prohibited from making, participating in making, or attempting to influence the decision.

Enforcement

Enforcement of civil violations of Proposition 9 provisions governing conflict of interest codes rests with the FPPC. Enforcement of the Act’s criminal provisions rests with the California Attorney General. Penalties may include fines, and may be assessed for violations such as not filing a Form 700, filing the Form 700 late, not reporting financial interests or business interests required to be reported, or not fully reporting such interests.

Can I vote?

**A Basic Overview
Of Public Officials'
Obligations Under the
Political Reform Act's
Conflict-of-Interest Rules**



**California
Fair Political
Practices
Commission**

“My home is near the proposed new shopping mall. Can I vote on the issue at next month’s Planning Commission meeting?”

Many of you may have been confronted with such questions. This booklet is offered by the FPPC as a general overview of your obligations under the Political Reform Act’s conflict-of-interest rules. Using non-technical terms, the booklet is aimed at helping you understand your obligations at the “big picture” level and to help guide you to more detailed resources.

Stripped of legal jargon:

➤ You have a conflict of interest with regard to a particular government decision if it is sufficiently likely that



Fair Political Practices Commission

Toll-free Advice Line: 1-866-ASK-FPPC

the outcome of the decision will have an important impact on your economic interests, **and**

➤ a significant portion of your jurisdiction does not also feel the important impact on their economic interests.

The voters who enacted the Political Reform Act by ballot measure in 1974 judged such circumstances to be enough to influence, or to appear to others to influence, your judgment with regard to that decision.

The most important thing you can do to comply with this law is to learn to recognize the economic interests from which a conflict of interest can arise. No one ever has a conflict of interest under the Act “on general principles” or because of personal bias regarding a person or subject. A conflict of interest can only arise from particular kinds of economic interests, which are explained in non-technical terms later in this booklet.

An important note...

You should not rely solely on this booklet to ensure compliance with the Political Reform Act, but should also consult the Act and Commission regulations. The Political Reform Act is set forth at Cal. Gov. Code §§81000-91014, and the Fair Political Practices Commission regulations are contained in Title 2, Division 6 of the California Code of Regulations. Both the Act and regulations are available on the FPPC’s web site, <http://www.fppc.ca.gov>. Persons with obligations under the Act or their authorized representatives are also encouraged to call the FPPC toll-free advice line — **1-866-ASK-FPPC** — as far in advance as possible.

If you learn to understand these interests and to spot potential problems, the battle is mostly won because you can then seek help on the more technical details of the law from your agency's legal counsel or from the California Fair Political Practices Commission. **The Commission's toll-free advice line is 1-866-ASK-FPPC (1-866-275-3772).**

Under rules adopted by the FPPC, deciding whether you have a financial conflict of interest under the Political Reform Act is an eight-step process. If you methodically think through the steps whenever there may be a problem, you can avoid most — if not all — mistakes. These steps are spelled out and explained in general terms in this booklet.

If you learn nothing else from this booklet, remember these things:

- **This law applies only to financial conflicts of interest; that is, conflicts of interest arising from economic interests.**
- **Whether you have a conflict of interest that disqualifies you depends heavily on the facts of each governmental decision.**
- **The most important proactive step you can take to avoid conflict of interest problems is learning to recognize the economic interests from which conflicts of interest can arise.**

On the next page are the eight steps:

Eight steps to help you decide



Step One: Are you a “public official” within the meaning of the rules?

Step Two: Are you making, participating in making, or influencing a governmental decision?

Step Three: What are your economic interests? That is, what are the possible sources of a financial conflict of interest?

Step Four: Are your economic interests directly or indirectly involved in the governmental decision?

Step Five: What kinds of financial impacts on your economic interests are considered important enough to trigger a conflict of interest?

Step Six: The important question: Is it substantially likely that the governmental decision will result in one or more of the materiality standards being met for one or more of your economic interests?

Step Seven: If you have a conflict of interest, does the “public generally” exception apply?

Step Eight: Even if you have a disqualifying conflict of interest, is your participation legally required?

Next, here is a non-technical explanation of each:

Public Official

Step One — Are you a “public official,” within the meaning of the rules?

The Act’s conflict-of-interest rules apply to “public officials” as defined in the law. This first step in the analysis is usually a formality — you are probably a public official covered by the rules. If you are an elected official or an employee of a state or local government agency who is designated in your agency’s conflict-of-interest code, you are a “public official.” If you file a Statement of Economic Interests (Form 700) each year, you are a “public official” under the Act (even if you are not required to file a Form 700, in some cases you may still be considered a public official because the definition covers more than specifically designated employees). The cases that are tougher to determine typically involve consultants, investment managers and advisers, and public-private partnerships. If you have any doubts, contact your agency’s legal counsel or the FPPC.

Governmental Decision

Step Two — Are you making, participating in making, or influencing a governmental decision?

The second step in the process is deciding if you are engaging in the kind of conduct regulated by the

conflict-of-interest rules. The Act's conflict-of-interest rules apply when you:

- **Make** a governmental decision (for example, by voting or making an appointment).
- **Participate** in making a governmental decision (for example, by giving advice or making recommendations to the decision-maker).
- **Influence** a governmental decision (for example, by communicating with the decision-maker).

A good rule of thumb for deciding whether your actions constitute making, participating in making, or influencing a governmental decision is to ask yourself if you are exercising *discretion* or *judgment* with regard to the decision. If the answer is “yes,” then your conduct with regard to the decision is very probably covered.

When you have a conflict — Regulation 18702.5 (special rule for section 87200 public officials)

Government Code section 87105 and regulation 18702.5 outline a procedure that public officials specified in section 87200 must follow for disclosure of economic interests when they have a conflict of interest at a public meeting. The full text of this law and regulation may be viewed in the Library and Publications section of the FPPC's website at <http://www.fppc.ca.gov>.

Public officials specified in section 87200 of the Government Code, such as council members, planning commissioners, and boards of supervisors, must pub-

licly identify in detail the economic interest that creates the conflict, step down from the dais **and must then leave the room**. This identification must be following the announcement of the agenda item to be discussed or voted upon, but before either the discussion or vote commences.

Additionally, the disqualified official may not be counted toward achieving a quorum while the item is being discussed.

The identification of the conflict and economic interest must be made orally and shall be made part of the public record.

Exceptions:

- If the decision is to take place during a closed session, the identification of the economic interest must be made during the public meeting prior to the closed session but is limited to a declaration that the official has a conflict of interest. The economic interest that is the basis for the conflict need not be disclosed. The official may not be present during consideration of the closed session item and may not obtain or review any non-public information regarding the decision.
- A public official is not required to leave the room for an agenda item on the consent calendar provided that the official recuses himself or herself and publicly discloses the economic interest as described above.

- A public official may speak as a member of the general public only when the economic interest that is the basis for the conflict is a personal economic interest, for example, his or her personal residence or wholly owned business. The official must leave the dais to speak from the same area as the members of the public and may listen to the public discussion of the matter.

Examples:

— *The Arroyo City Council is considering widening the street in front of council member Smith's personal residence, which he solely owns. Council member Smith must disclose on the record that his home creates a conflict of interest preventing him from participating in the vote. He must leave the dais but can sit in the public area, speak on the matter as it applies to him and listen to the public discussion.*

— *Planning Commissioner Garcia is a greater than 10% partner in an engineering firm. The firm represents a client who is an applicant on a project pending before the planning commission. Commissioner Garcia must publicly disclose that the applicant is a source of income to her requiring her recusal. Commissioner Garcia must step down from the dais and leave the room. Since this is not a personal interest that is the basis for the conflict, she **may not** sit in the public area and listen to the discussion.*

— *Supervisor Robertson rents a home to a county employee. The county employee is the sub-*

*ject of a disciplinary matter in a closed session of the Board of Supervisors. During the open session prior to adjourning to closed session, Supervisor Robertson announces that he must recuse himself from participating in the closed session **but does not disclose that the reason for his recusal is a source of income nor does he name the county employee that is the source of income to him.** He may not attend the closed session or obtain any non-public information from the closed session.*

Economic Interests

Step Three — What are your economic interests? That is, what are the possible sources of a financial conflict of interest?

From a practical point of view, this third step is the most important part of the law for you. The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. There are six kinds of such economic interests from which conflicts of interest can arise:

- **Business Investment.** You have an economic interest in a business entity in which you, your spouse, your registered domestic partner, or your dependent children or anyone acting on your behalf has invested \$2,000 or more.
- **Business Employment or Management.** You have an economic interest in a business entity for which you are a director, officer, partner, trustee, employee, or hold any position of management.

- **Real Property.** You have an economic interest in real property in which you, your spouse, your registered domestic partner, or your dependent children or anyone acting on your behalf has invested \$2,000 or more, and also in certain leasehold interests.


“The most important thing you can do to comply with this law is to learn to recognize the economic interests from which a conflict of interest can arise.”

- **Sources of Income.** You have an economic interest in anyone, whether an individual or an organization, from whom you have received (or from whom you have been promised) \$500 or more in income within 12 months prior to the decision about which you are concerned. When thinking about sources of income, keep in mind that you have a community property interest in your spouse’s or registered domestic partner’s income — a person from whom your spouse or registered domestic partner receives income may also be a source of a conflict of interest to you. Also keep in mind that if you, your spouse, your registered domestic partner or your dependent children own 10 percent or more of a business, you are considered to be receiving “pass-through” income from the business’s clients. In other words, the business’s clients may be considered sources of income to you.
- **Gifts.** You have an economic interest in anyone, whether an individual or an organization, who has

given you gifts which total \$360 or more within 12 months prior to the decision about which you are concerned.

- **Personal Financial Effect.** You have an economic interest in your personal expenses, income, assets, or liabilities, as well as those of your immediate family. This is known as the “personal financial effects” rule. If these expenses, income, assets or liabilities are likely to go up or down by \$250 or more in a 12-month period as a result of the governmental decision, then the decision has a “personal financial effect” on you.

On the Statement of Economic Interests (Form 700) you file each year, you disclose many of the economic interests that could cause a conflict of interest for you. However, be aware that not all of the economic interests that may cause a conflict of interest are listed on the Form 700. A good example is your home. It is common for a personal residence to be the economic interest that triggers a conflict of interest even though you are not required to disclose your home on the Form 700.



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Directly or Indirectly Involved?

Step Four — Are your economic interests directly or indirectly involved in the governmental decision?

An economic interest which is directly involved in — and therefore directly affected by — a governmental decision creates a bigger risk of a conflict of interest than does an economic interest which is only indirectly involved in the decision. As a result, the FPPC's conflict-of-interest regulations distinguish between economic interests that are directly involved and interests that are indirectly involved.

Once you have identified your economic interests, you must next decide if they are directly involved in the governmental decision about which you are concerned. The FPPC has established specific rules for determining whether each kind of economic interest is directly or indirectly involved in a governmental decision.

The details of these rules are beyond the scope of this guide. In general, however, an economic interest is directly involved if it is the subject of the governmental decision. For example, if the interest is real property, and the decision is about building a donut shop down the block from the property, then the interest is directly involved. If the interest is a business, and the decision is whether to grant a license for which the business has applied, the interest is directly involved.

These are just examples; you should contact your agency counsel, the FPPC and the specific regulations

if you have questions as each case arises. Note also that the next step in the analysis — applying the right standard to determine whether an impact is material — depends in part on whether the interest is directly or indirectly involved. The regulations — Sections 18704 through 18704.5 — and other helpful information can be found on the FPPC’s web site, <http://www.fppc.ca.gov>.

Materiality (Importance)

Step Five — What kinds of financial impacts on your economic interests are considered important enough to trigger a conflict of interest?

At the heart of deciding whether you have a conflict of interest is a prediction: Is it sufficiently likely that the governmental decision will have a material financial effect on your economic interests? As used here, the word “material” is akin to the term “important.” You will have a conflict of interest only if it is reasonably foreseeable that the governmental decision will have an important impact on your economic interests.

The FPPC has adopted rules for deciding what kinds of financial effects are important enough to trigger a conflict of interest. These rules are called “materiality standards,” that is, they are the standards that should be used for judging what kinds of financial impacts resulting from governmental decisions are considered material or important.

There are too many of these rules to review in detail in this booklet. Again, you can seek advice for your

“Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.”

-- California Political Reform Act of 1974

agency counsel or the FPPC. However, to understand the rules at a “big picture” level, remember these facts:

- If the economic interest is directly involved in the governmental decision, the standard or threshold for deeming a financial impact to be material is stricter (i.e. lower). This is because an economic interest that is directly involved in a governmental decision presents a bigger conflict-of-interest risk for the public official who holds the interest.
- On the other hand, if the economic interest is not directly involved, the materiality standard is more lenient because the indirectly involved interest presents a lesser danger of a conflict of interest.
- There are different sets of standards for the different types of economic interests. That is, there is one set of materiality standards for business entities, another set for real property interests, and so on.
- The rules vary by the size and situation of the economic interest. For example, a moment’s thought will tell you that a \$20,000 impact resulting from a governmental decision may be crucial to a small business, but may be a drop in the bucket for a big corporation. For example, the materiality standards

distinguish between large and small businesses, between real property which is close or far from property which is the subject of the decision.

Does a Conflict of Interest Result?

Step Six — Is it substantially likely that the governmental decision will result in one or more of the materiality standards being met for one or more of your economic interests?

As already mentioned in the introduction, the heart of the matter is deciding whether it is sufficiently likely that the outcome of the decision will have an important impact on your economic interests.

What does “sufficiently likely” mean? Put another way, how “likely” is “likely enough?” The Political Reform Act uses the words “reasonably foreseeable.” The FPPC has interpreted these words to mean “substantially likely.” Generally speaking, the likelihood need not be a certainty, but it must be more than merely possible.

A concrete way to think about this is to ask yourself the following question: Is it substantially likely that one of the materiality standards I identified in step five will be met as a result of the government decision? Step six calls for a factual determination, not necessarily a legal one. Also, an agency may sometimes segment (break down into separate decisions) a decision to allow participation by an official if certain conditions are

met. Therefore, you should always look at your economic interest and how it fits into the entire factual picture surrounding the decision.

“Public Generally” Exception

Step Seven — If you have a conflict of interest, does the “public generally” exception apply?

Now that you have determined that you will have a conflict of interest for a particular decision, you should see if the exceptions in Step 7 and Step 8 permit you to participate anyway. Not all conflicts of interest prevent you from lawfully taking part in the government decision at hand. Even if you otherwise have a conflict of interest, you are not disqualified from the decision if the “public generally” exception applies.

This exception exists because you are less likely to be biased by a financial impact when a significant part of the community has economic interests that are substantially likely to feel essentially the same impact from a governmental decision that your economic interests are likely to feel. If you can show that a significant segment of your jurisdiction has an economic interest that feels a financial impact which is substantially similar to the impact on your economic interest, then the exception applies.

The “public generally” exception must be considered with care. You may not just assume that it applies. There are specific rules for identifying the specific seg-

ments of the general population with which you may compare your economic interest, and specific rules for deciding whether the financial impact is substantially similar. Again, contact your agency counsel, the FPPC and the specific rules for advice and details. The regulations outlining the steps to apply the “public generally” exception can be found on the FPPC website at <http://www.fppc.ca.gov> under regulations 18707-18707.9.

Are you required to participate?

Step Eight — Even if you have a disqualifying conflict of interest, is your participation legally required?

In certain rare circumstances, you may be called upon to take part in a decision despite the fact that you have a disqualifying conflict of interest. This “legally required participation” rule applies only in certain very specific circumstances in which your government agency would be paralyzed, unable to act. You are most strongly encouraged to seek advice from your agency legal counsel or the FPPC before you act under this rule.

Conclusion

Generally speaking, here are the keys to meeting your obligations under the Political Reform Act’s conflict-of-interest laws:

- Know the purpose of the law, which is to prevent biases, actual and apparent, which result from the financial interests of the decision-makers.
- Learn to spot potential trouble early. Understand which of your economic interests could give rise to a conflict of interest.
- Understand the “big picture” of the rules. For example, know why the rules distinguish between directly and indirectly involved interests, and why the public generally exception exists.
- Realize the importance of the facts. Deciding whether you have a disqualifying conflict of interest depends just as much — if not more — on the facts of your particular situation as it does on the law.
- Don’t try to memorize all of the specific conflict-of-interest rules. The rules are complex, and the penalties for violating them are significant. Learn to understand the “big picture.” You’ll then be able to look up or ask about the particular rules you need to apply to any given case.
- Don’t be afraid to ask for advice. It is available from your agency’s legal counsel and from the FPPC.



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Enforcement hot-line:

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**Fair Political
Practices Commission**

Limitations and Restrictions on Gifts, Honoraria, Travel and Loans

A Fact Sheet for

- Elected State Officers and Candidates for Elective State Office
- Members of State Boards and Commissions
- Designated Employees of State Government Agencies
- State Officials Who Manage Public Investments

**California Fair Political
Practices Commission**

Toll-free advice line: 1 (866) ASK-FPPC
Web site: www.fppc.ca.gov

August 2005

Introduction

The Political Reform Act¹ imposes limits on gifts, prohibits honoraria payments,² and imposes limits and other restrictions on the receipt of travel payments and personal loans by the following state officials:

- Elected state officers, candidates for elective state office, and other state officials specified in Government Code section 87200³
- Members of state boards and commissions
- Designated employees of state agencies (i.e., officials and employees of state agencies who file statements of economic interests (Form 700) under their agency's conflict of interest code)

This fact sheet summarizes the major provisions of the Act concerning gifts, honoraria, travel, and loans. You should not, however, rely on the fact sheet alone to ensure compliance with the Act. If you have any questions, contact the Fair Political Practices Commission at (866) ASK-FPPC or visit our web site at www.fppc.ca.gov. Commission advice letters from 1986 to present are available on Lexis-Nexis at "CA FAIR" under California Library or on Westlaw at "CA-ETH."

¹ Government Code sections 81000-91014. Commission regulations appear at 2 California Code of Regulations section 18000, *et seq.*

² The gift limit and honoraria prohibition do not apply to judges (although they do apply to candidates for judicial office) or to any part-time member of the governing board of any public institution of higher education, unless the member is also an elected official.

³ State officials specified in section 87200 include elected state officers, candidates for elective state office, members of the Public Utilities Commission, Energy Resources Conservation and Development Commission, Fair Political Practices Commission, and California Coastal Commission, and officials who manage public investments.

Gifts

Limitations

Elected state officers, candidates for elective state office, and other state agency officials and employees are subject to two gift limits:

1. Elected state officers, candidates for elective state office, and designated employees of the legislature may not accept gifts aggregating more than \$10 in a calendar month from any single lobbyist or lobbying firm. State agency officials, including board and commission members, officials who manage public investments, and employees, may not accept gifts aggregating more than \$10 in a calendar month from a single lobbyist or lobbying firm if the lobbyist or firm is registered to lobby the official or employee's agency. (Sections 86201-86204.)

2. Gifts from any other single source may not exceed \$360 in a calendar year. For officials and employees who file statements of economic interests (Form 700) under a state agency's conflict of interest code ("designated employees"), this limit applies only if the official or employee would be required to report income or gifts from that source on the Form 700, as outlined in the "disclosure category" portion of the agency's conflict of interest code. (Section 89503.)⁴

What is a "Gift"?

A "gift" is any payment or other benefit provided to you that confers a personal benefit for which you do not provide goods or services of equal or greater value. A gift

includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of the public. (Section 82028.) (See FPPC Regulation 18946.1 for valuation guidelines.)

Except as discussed below, you have "received" or "accepted" a gift when you know you have actual possession of the gift or when you take any action exercising direction or control over the gift, including discarding the gift or turning it over to another person. (Regulation 18941.)

Exceptions

The Act and Commission regulations provide exceptions for certain types of gifts. (Section 82028; Regulations 18940-18946.5.) **The following are not subject to any gift limit and are not required to be disclosed on a statement of economic interests (Form 700):**

1. Gifts which you return (unused) to the donor, or for which you reimburse the donor, within 30 days of receipt. (Section 82028(b)(2); Regulation 18943.)
2. Gifts which you donate (unused) to a non-profit, tax-exempt (501(c)(3)) organization or a government agency within 30 days of receipt without claiming a deduction for tax purposes. (Section 82028(b)(2); Regulation 18943.)
3. Gifts from your spouse, child, parent, grandparent, grandchild, brother, sister,

⁴ Section 89503 provides for a biennial adjustment to the gift limit to reflect changes in the Consumer Price Index. For 2005-2006, the gift limit is \$360. (Section 89503; Regulation 18940.2.) Gifts from a single source that aggregate \$50 or more must be disclosed, and gifts aggregating \$360 or more received by an official may subject the official to disqualification with respect to the source (Section 87103(e).) Designated employees should obtain a copy of their conflict of interest code from their agency. Some conflict of interest codes require very limited disclosure of income and gifts. If your agency's conflict of interest code requires you to disclose income and gifts only from specified sources, gifts from sources that are not required to be disclosed are not subject to the \$360 gift limit.

parent-in-law, brother-in-law, sister-in-law, aunt, uncle, niece, nephew, or first cousin or the spouse of any such person, unless he or she is acting as an agent or intermediary for another person who is the true source of the gift. (Section 82028(b)(3); Regulation 18942(a)(3).)

4. Gifts of hospitality involving food, drink, or occasional lodging that you receive in an individual's home when the individual or a member of his or her family is present. (Regulation 18942(a)(7).) Such hospitality provided by a lobbyist is a gift if it is paid for or reimbursed by the lobbyist employer or if the lobbyist deducts the cost as a business expense. (Regulation 18630.)

5. Gifts approximately equal in value exchanged between you and another individual (other than a lobbyist) on holidays, birthdays, or similar occasions. (Regulation 18942(a)(8).)

6. Informational material provided to assist you in the performance of your official duties, including books, reports, pamphlets, calendars, periodicals, videotapes, or free admission or discounts to informational conferences or seminars.

"Informational material" may also include scale models, pictorial representations, maps, and other such items, provided that if the item's fair market value is more than \$360, you have the burden of demonstrating that the item is informational. In addition, on-site demonstrations, tours, or inspections designed specifically for public officials are considered informational material, but this exception does not apply to meals or to transportation to the site unless the transportation is not commercially available. (Section 82028(b)(1); Regulations 18942(a)(1) and 18942.1.)

7. A bequest or inheritance. (Section 82028(b)(5); Regulation 18942(a)(5).)

8. Campaign contributions, including rebates or discounts received in connection

with campaign activities. (Section 82028(b)(4); Regulation 18942(a)(4).) However, campaign contributions must be reported in accordance with the campaign disclosure provisions of the Act and may be subject to the contribution limitations imposed by the Act.

9. Personalized plaques and trophies with an individual value of less than \$250. (Section 82028(b)(6); Regulation 18942(a)(6).)

10. Tickets to attend fundraisers for campaign committees or other candidates, and tickets to fundraisers for organizations exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. (Regulation 18946.4.)

11. Free admission, refreshments, and similar non-cash nominal benefits provided to you at an event at which you give a speech, participate in a panel or seminar, or provide a similar service. Transportation within California, and any necessary lodging and subsistence provided directly in connection with the speech, panel, seminar, or similar service, are also not considered gifts. (Regulation 18942(a)(11).)

12. Passes or tickets that provide admission or access to facilities, goods, services, or other benefits (either on a one-time or repeated basis) that you do not use and do not give to another person. (Regulation 18946.1.)

13. Gifts provided directly to members of your family unless you receive direct benefit from the gift or you exercise discretion and control over the use or disposition of the gift. (Regulation 18944.) (Note: In most cases, the full amount of a gift made to you and your spouse must be counted for purposes of disclosure and the gift limits. However, see the discussion below regarding wedding gifts.)

14. Gifts provided to your government agency. This may include passes or tickets

to facilities, goods, or services, travel payments, and other benefits. However, certain conditions must be met before a gift received by an official through his or her agency would not be considered a gift to the official. (Regulations 18944.1-18944.2.) Contact the FPPC for detailed information.

15. Generally, payments made by a third party to co-sponsor an event that is principally legislative, governmental, or charitable in nature. Payments made by a single source totaling \$5,000 or more in a calendar year for this type of event must be reported if the payments are made at the behest of (at the request of, or in consultation or coordination with) an elected official. The report must be made to the elected official's agency, and then forwarded to the Fair Political Practices Commission. (Section 82015(b)(2)(B)(iii).)

16. Leave credits (e.g., sick leave or vacation credits) received under a bona fide catastrophic or emergency leave program established by your employer and available to all employees in the same job classification or position. Donations of cash are gifts and are subject to limits and disclosure. (Regulation 18942(a)(9).)

17. Food, shelter, or similar assistance received in connection with a disaster relief program. The benefits must be received from a governmental agency or charity and must be available to the general public. (Regulation 18942(a)(10).)

Reportable Gifts Not Subject to Limits

The following exceptions are also applicable to gifts, but you may be required to report these items on a statement of economic interests (Form 700) and they can subject you to disqualification:⁵

1. Certain payments for transportation, lodging, and subsistence. Travel payments are discussed below.

2. Wedding gifts are not subject to the \$360 gift limit, but they are subject to the \$10 lobbyist/lobbying firm gift limit. In addition, wedding gifts are reportable. However, for purposes of valuing wedding gifts, one-half of the value of each gift is attributable to each spouse, unless the gift is intended exclusively for the use and enjoyment of one spouse, in which case the entire value of the gift is attributable to that individual. (Regulation 18946.3.)

3. A prize or award received in a bona fide competition not related to your official status is not subject to the gift limit, but must be reported as income if the value of the prize or award is \$500 or more. (Regulation 18946.5.)

⁵ Designated employees should consult the "disclosure category" portion of their agency's conflict of interest code to determine if a particular source of income or gifts must be disclosed.

Honoraria

The Prohibition

State officials specified in Government Code section 87200 (see page 1) are prohibited from receiving honoraria payments. Officials and employees of state agencies who file statements of economic interests (Form 700) under the agency's conflict of interest code ("designated employees") may not receive honoraria payments from any source if the employee would be required to report income or gifts from that source on the Form 700, as outlined in the "disclosure category" portion of the conflict of interest code. (Section 89502.)

What is an "Honorarium"?

An "honorarium" is any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal, or like gathering. (Section 89501.)

A "speech given" means a public address, oration, or other form of oral presentation, including participation in a panel, seminar, or debate. (Regulation 18931.1.)

An "article published" means a nonfictional written work: 1) that is produced in connection with any activity other than the practice of a bona fide business, trade, or profession; and 2) that is published in a periodical, journal, newspaper, newsletter, magazine, pamphlet, or similar publication. (Regulation 18931.2.)

"Attendance" means being present during, making an appearance at, or serving as host or master of ceremonies for any public or private conference, convention, meeting, social event, meal, or like gathering. (Regulation 18931.3.)

Exceptions

The Act and Commission regulations provide certain exceptions to the prohibition on honoraria. (Section 89501; Regulations 18930-18933.) **The payments described below are not prohibited and are not required to be disclosed on a statement of economic interests (Form 700):**

1. An honorarium that you return (unused) to the donor or the donor's agent or intermediary within 30 days. (Section 89501(b); Regulation 18933.)
2. An honorarium that is delivered to the State Controller within 30 days for donation to the General Fund for which you do not claim a deduction for income tax purposes. (Section 89501(b); Regulation 18933.)
3. A payment that is not delivered to you but is made directly to a bona fide charitable, educational, civic, religious, or similar tax-exempt, non-profit organization. However:
 - You may not make the donation a condition for your speech, article, or attendance;
 - You may not claim the donation as a deduction for income tax purposes;
 - You may not be identified to the non-profit organization in connection with the donation; and
 - The donation may have no reasonably foreseeable financial effect on you or on any member of your immediate family. (Regulation 18932.5.)
4. A payment received from your spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse of any such person. However, a payment that would be considered an honorarium is

prohibited if one of these persons is acting as an agent or intermediary for someone else. (Regulation 18932.4(b).)

5. Items 6, 8, 9, and 11 under “Exceptions to the Definition of ‘Gift’,” discussed earlier in this fact sheet.

Exceptions That May Be Reportable as Income or Gifts

The following payments are not considered “honoraria” but may be reportable and can subject you to disqualification:⁶

1. Payments received for a comedic, dramatic, musical, or other similar artistic performance, and payments received for the publication of books, plays, or screenplays. (Regulation 18931.1-18931.2.) However, such payments are reportable income.

2. Income earned for your personal services if the services are provided in connection with a bona fide business, trade, or profession —such as teaching, practicing law, medicine, insurance, real estate, banking, or building contracting — and the services are customarily provided in connection with the business, trade, or profession.

This exception does not apply if the sole or predominant activity of the business, trade, or profession is making speeches. In addition, you must meet certain criteria to establish that you are a bona fide business, trade, or profession (such as maintenance of business records, licensure, proof of teaching position) before a payment received for personal services that may meet the definition of honorarium would be considered earned income and not an honorarium.

(Section 89501(b); Regulations 18932-18932.3.) Earned income is required to be reported. Contact the FPPC for detailed information.

3. Free admission, food, beverages, and other non-cash nominal benefits provided to you at any public or private conference, convention, meeting, social event, meal, or similar gathering, whether or not you provide any substantive service at the event. (Regulation 18932.4(f).) Although these items are not considered honoraria, they may be reportable gifts and subject to the gift limit.

4. Certain payments for transportation, lodging, and subsistence are not considered honoraria but may be reportable and subject to the gift limit. (Sections 89501(c) and 89506.) Travel payments are discussed below.

⁶ Designated employees should consult the “disclosure category” portion of their agency’s conflict of interest code to determine if a particular source of income or gifts must be disclosed.

Travel Payments

The Act and Commission regulations provide exceptions to the gift limit and honoraria prohibition for certain types of travel payments. (Section 89506; Regulations 18950-18950.4.)

The term “travel payment” includes payments, advances, or reimbursements for travel, including actual transportation and related lodging and subsistence. (Section 89501(c).)

Exceptions

The following types of travel payments are not prohibited or subject to any limit and are not reportable on a statement of economic interests (Form 700):

1. Transportation within California provided to you directly in connection with an event at which you give a speech, participate in a panel or seminar, or provide a similar service. (Regulation 18950.3.)
2. Free admission, refreshments, and similar non-cash nominal benefits provided to you during the entire event (inside or outside California) at which you give a speech, participate in a panel or seminar, or provide a similar service. (Regulation 18950.3.)
3. Necessary lodging and subsistence (inside or outside California), including meals and beverages, provided to you directly in connection with an event at which you give a speech, participate in a panel or seminar, or provide a similar service. In most cases, the exclusion for meals and beverages is limited to those provided on the day of the activity. (Regulation 18950.3.)

4. Travel payments provided to you by the State of California or by any state, local, or federal government agency which would be considered income and not a gift (i.e., payments for which you provide equal or greater consideration). (Section 89506(d)(2); Regulation 18950.1(d).)

5. Reimbursements for travel expenses provided to you by a bona fide non-profit, tax-exempt (501(c)(3)) entity for which you provide equal or greater consideration. (Section 82030(b)(2).)

6. Travel payments provided to you directly in connection with campaign activities. However, these payments must be reported in accordance with the campaign disclosure provisions of the Act. (Regulations 18950.1(c); 18950.4.)

7. Any payment for travel that is excluded from the definition of “gift” as discussed earlier in this fact sheet.

Reportable Payments Not Subject to Limit

The following travel payments are not prohibited or subject to the \$360 gift limit but may be reportable on a statement of economic interests (Form 700, Schedule F).⁷ If the travel payment would otherwise be considered a gift under the Act (i.e., you did not provide equal or greater consideration for the payment), the payment would be subject to the \$10 lobbyist/lobbying firm gift limit.⁸

1. Travel which is reasonably necessary in connection with a bona fide business,

⁷ Designated employees should consult the “disclosure category” portion of their agency’s conflict of interest code to determine if a particular source of income or gifts must be disclosed.

⁸ Under Article IV, Section 4(a), and Article V, Section 14(a), of the California Constitution, elected state officers are prohibited from receiving salary, wages, commissions or other earned income from a lobbyist, lobbying firm or person who, during the previous 12 months, has been under a contract with the Legislature.

trade, or profession, and which satisfies the criteria for federal income tax deductions for business expenses specified in Sections 162 and 274 of the Internal Revenue Code. (Section 89506(d)(3); Regulation 18950.1 (e).) For reporting purposes, these travel payments would be considered part of the salary, wages, and other income received from the business entity and would be reported on Schedule A-2 or C of Form 700.

2. Travel within the United States that is reasonably related to a legislative or governmental purpose — or to an issue of state, national, or international public policy — in connection with an event at which you give a speech, participate in a panel or seminar, or provide a similar service. Lodging and subsistence expenses in this case are limited to the day immediately preceding, the day of, and the day immediately following the speech, panel, or other similar service. (Section 89506(a)(1); Regulation 18950.1(a)(2).)

Note that this exception is different than travel payments described earlier. Under the circumstances described in this paragraph, transportation outside California but within the United States is not subject to the \$360 gift limit but is reportable and can subject a public official to disqualification. On the other hand, transportation inside California in connection with a speech is not limited, reportable, or disqualifying. (Regulation 18950.3.)

In addition, the lodging and subsistence payments described in this paragraph can be provided both the day before and the day after a speech without being subject to the \$360 limit. However, payments for lodging and subsistence are reportable and subject to the lobbyist gift limit unless they are received directly in connection with the speech.

3. Travel **not** in connection with giving a speech, participating in a panel or seminar,

or providing a similar service but which is reasonably related to a legislative or governmental purpose, or to an issue of state, national, or international public policy, and which is provided by:

- A government, governmental agency, foreign government, or government authority;
- A bona fide public or private educational institution defined in Section 203 of the Revenue and Taxation Code;
- A non-profit organization that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code; or
- A foreign organization that substantially satisfies the requirements for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

(Section 89506(a)(2); Regulation 18950.1(b).)

Loans

Personal loans received by certain state officials are subject to limits and other restrictions and, in some circumstances, a personal loan that is not being repaid or is being repaid below certain amounts may become a gift to the official who received it.

Limitations on Loans from Agency Officials, Consultants, and Contractors

If you are an elected official, an official specified in Section 87200 (see page 1), or you are exempt from the state civil service system pursuant to subdivisions (c), (d), (e), (f), or (g) of Section 4 of Article VII of the Constitution, you may not receive a personal loan that exceeds \$250 at any given time from an officer, employee, member, or consultant of your government agency or an agency over which your agency exercises direction and control. (Section 87460(a) and (b).)

In addition, you may not receive a personal loan that exceeds \$250 at any given time from any individual or entity that has a contract with your government agency or an agency over which your agency exercises direction and control. This limitation does not apply to loans received from banks or other financial institutions, and retail or credit card transactions, made in the normal course of business on terms available to members of the public without regard to your official status. (Section 87460(c) and (d).)

Loan Terms Applicable Only to Elected Officials

In addition to the limitations above, if you are an elected official, you may not receive a personal loan of \$500 or more unless the loan is made in writing and clearly states the terms of the loan. The loan document must include the names of the parties to the loan agreement, as well as the date, amount,

interest rate, and term of the loan. The loan document must also include the date or dates when payments are due and the amount of the payments. (Section 87461.)

The following loans are not subject to these limits and documentation requirements:

1. Loans received by an elected officer's or candidate's campaign committee.
2. Loans received from your spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin, or the spouse of any such person unless he or she is acting as an agent or intermediary for another person not covered by this exemption.
3. Loans made, or offered in writing, prior to January 1, 1998. (Sections 87460 and 87461.)

Loans as Gifts

Under the following circumstances, a personal loan received by **any** public official (elected and other officials specified in Section 87200, as well as any other state official or employee required to file statements of economic interests) may become a gift and subject to gift reporting and limitations:

1. If the loan has a defined date or dates for repayment and has not been repaid, the loan will become a gift when the statute of limitations for filing an action for default has expired.
2. If the loan has no defined date or dates for repayment, the loan will become a gift if it remains unpaid when one year has elapsed from the later of:
 - The date the loan was made;

-
- The date the last payment of \$100 or more was made on the loan; or
 - The date upon which you have made payments aggregating to less than \$250 during the previous 12 months. (Section 87462.)

The following loans will not become gifts:

1. A loan made to an elected officer's or candidate's campaign committee. This loan would, however, be a campaign contribution. Consult the FPPC campaign manual for state candidates (Manual 1) for more details.

2. A loan described above on which the creditor has taken reasonable action to collect the balance due.

3. A loan described above on which the creditor, based on reasonable business considerations, has not undertaken collection action. (However, except in a criminal action, the creditor has the burden of proving that the decision not to take collection action was based on reasonable business considerations.)

4. A loan made to an official who has filed for bankruptcy and the loan is ultimately discharged in bankruptcy.

5. A loan that would not be considered a gift as outlined earlier in this fact sheet (e.g., loans from certain family members). (Section 87462.)



167 Department of Consumer Affairs Policy & Procedures

SUBJECT: NON-DISCRIMINATION	SUPERSEDES: EEO 01-03	POLICY # EEO 04-01
TITLE SEXUAL HARASSMENT PREVENTION POLICY	EFFECTIVE: IMMEDIATELY	PAGE: 1 of 9 ATTACHMENTS: DCA 99K-60 DCA 99K-70 DCA 99K-80
DISTRIBUTE TO: ALL EMPLOYEES	APPROVED BY:: CHARLENE ZETTEL, Director Department of Consumer Affairs	
ISSUE DATE: March 30, 2004		

Introduction

Employees have a right to work in an environment that is free from all forms of discrimination, including sexual harassment. Sexual harassment is a form of sex discrimination, prohibited by State and Federal law. All governmental officials and employees are expected to take proactive steps to vigorously and visibly demonstrate their support for a harassment-free work place and their strong disapproval of sexually harassing conduct and/or behavior.

Under the Fair Employment and Housing Act (FEHA), employers are strictly liable for the sexually harassing acts of their supervisors, managers, or agents (Government Code Section 12940). Under Federal law, employers are held strictly liable for “quid pro quo” harassment.

Policy

It is the policy of the Department of Consumer Affairs (DCA) to provide a work environment free from all forms of sexually harassing conduct and/or behavior.

Sexual harassment, which includes gender identity harassment and harassment based on sexual orientation, is prohibited. Departmental policy requires that all employees and non-employees assume responsibility for maintaining a work environment free from any harassing conduct.

Applicability

This policy applies to all governmental officials and employees of DCA, and any of its divisions, bureaus, boards and other constituent agencies.

Purpose

The primary purpose of DCA’s sexual harassment prevention policy is to prevent inappropriate conduct that constitutes sexual harassment and to provide a work environment free of harassment. Employees are expected to adhere to a standard of conduct, and managers and supervisors are expected to enforce conduct, that is respectful of all persons within the work environment.

All employees should be made aware of the seriousness of violations of the sexual

harassment prevention policy. Managerial and supervisory personnel should be educated about their specific responsibilities. Rank and file employees should be cautioned against using peer pressure to discourage harassment victims from using the internal complaint procedures available to them.

Zero Tolerance Policy

It is the policy of the DCA to provide a safe work environment free from sexual harassment. Sexual harassment, and any form of sex discrimination including harassment based on gender or sexual orientation *will not be tolerated* by DCA. Such behavior will be addressed seriously and appropriate corrective action(s) taken. A “zero tolerance policy” means working to prevent inappropriate behavior, so corrective action, up to and including formal discipline, will be taken when policy violations occur, even if they are not so serious as to be unlawful. For example, even though an inappropriate sexual comment does not in itself rise to the level of creating a hostile work environment under the law, such a comment is unacceptable in the workplace, violates DCA’s Zero Tolerance Policy, and will be subject to corrective action.

Employees may report incidents of this nature without fear of reprisal or retaliation. Reporting incidents of sexual harassment will not result in reprisal/retaliation against employees being harassed. Persons determined to have committed acts of reprisal/retaliation are subject to disciplinary action.

A program to eliminate sexual harassment from the workplace is not only required by law, but it is the most practical way to avoid or limit damages if harassment should occur despite preventative efforts.

Authority

- Title VII of the Civil Rights Act of 1964
- California Government Code Sections 12925-12928
- California Government Code Sections 12940-12951
- California Government Code Sections 19700-19706
- California Fair Employment and Housing Act, commencing with Government Code Section 12900 et seq.
- California Civil Code Sections 51.9 and 52
- California Executive Order B-54-79
- 29 Code of Federal Regulations Section 1604.11
- Penal Code Section 422.76

Section 12926 of the Government Code has been amended to expand the prohibition on sexual discrimination and harassment by including gender, as defined, in the Sex and Gender section of this policy.

Section 12949 has been added to the Government Code to read: “Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee’s gender identity.”

Definition of Sexual Harassment

Sexual harassment is generally defined as unsolicited, unwanted and unwelcome sexual advances, requests for sexual favors, sexual demands, or other verbal, physical or visual conduct of a sexual nature when it unreasonably interferes with a person's work performance or creates an intimidating, hostile, or offensive work environment.

Such acts are considered sexual harassment when:

1. Submission to such conduct is either an explicit or implicit term or condition of employment.
2. Submission to, or rejection of, such conduct is used as a basis for an employment decision affecting the individual.
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

There are two distinct forms of sexual harassment:

1. **Quid Pro Quo** (Latin, meaning "this for that") or conditional sexual harassment – When employment decisions are based on an employee's acceptance or rejection of unwelcome sexual advances or requests for sexual favors. For example, an employee is fired or denied a job or employment benefits because he/she refused to grant sexual favors.
2. **Hostile Work Environment** – A work atmosphere created by unwelcome sexual behavior or offensive, hostile and/or intimidating behavior directed at an employee because of that employee's sex. Hostile work environment sexual harassment is sexual conduct that does not directly threaten the denial of an employment benefit, but interferes with an individual's ability to perform his or her job, and/or is conduct that offends an individual and affects his or her emotional well being.

A single incident involving unwelcome sexual behavior is harassment, but may not necessarily serve as a basis for a hostile work environment complaint unless it is either severe or repeated, and management does nothing to stop the behavior.

The Fair Employment and Housing Commission, California appellate courts, and the Ninth Circuit Court apply the standard of **a reasonable person of the same gender as the complainant** to their evaluation of whether the conduct is severe or pervasive enough to create a hostile work environment. This standard, known as the Ellison Standard after the precedential court case of this name, recognizes that men and women react differently to unwanted sexual conduct. It acknowledges that conduct that many men consider harmless is often objectionable and offensive to the "reasonable woman." The Ellison Standard instructs the fact-finder to evaluate the unwanted sexual conduct in light of the gender-specific experiences and perspective of the victim.

Intent vs. Impact - Whether the conduct is considered unwelcome is determined by the recipient of the behavior. The intent of the alleged harasser is irrelevant. Therefore, it is the **impact** of the behavior and the victim's perception of the situation, not the **intent** of the alleged harasser that determines if sexual harassment has occurred.

Types of Sexual Harassment

Sexual harassment is behavior that threatens, intimidates, humiliates, embarrasses or irritates.

Types of prohibited sexual harassment include, but are not limited to the following:

Type	Example
<u>Written</u>	Sexually aggressive or obscene letters, notes, e-mail messages, or invitations.
<u>Visual</u>	<p>Leering or making sexual gestures.</p> <p>Displaying sexually suggestive objects, pictures, cartoons, posters, or drawings in hard copy or on-line.</p> <p>Using DCA computers to e-mail, display, or otherwise make available material that contains obscene, pornographic, sexually oriented, offensive, or otherwise sexually biased or discriminatory information.</p>
<u>Verbal</u>	<ul style="list-style-type: none"> • Sexually derogatory comments, slurs, jokes, remarks, invitations, or epithets. • Using sexually patronizing terms such as “honey,” “doll,” or “babe.” • Making verbal sexual advances or propositions. <p>Note: It is not necessary to use graphic or sexually explicit language to verbally harass someone. Otherwise gender neutral language, spoken in a suggestive tone of voice or accompanied by visual or physical harassment, can also be considered sexual harassment.</p>
<u>Physical</u>	<ul style="list-style-type: none"> • Sexual assault • Attempted rape • Impeding or blocking movements • Touching, or indecent exposure <p>Such conduct, even in a single incident, may constitute actionable sexual harassment or criminal conduct. Criminal violations should be reported immediately to the proper law enforcement authorities. Common physical gestures like hugging or other physical contact can be properly taken in context with other comments and/or behaviors.</p>
<u>Other</u>	<ul style="list-style-type: none"> • Sexual advances which are unwanted (this may include situations which began as reciprocal attractions, but later ceased to be reciprocal); • Implying or actually withholding support for appointment, promotion, transfer or change of assignment; initiating a rejection on probation or adverse action; or suggesting that a poor performance report will be prepared if requests for sexual favors are not met; • Reprisals or threats after a negative response to sexual advances; • Hazing of employees in the work environment. This may include being dared or asked to perform unsafe work practices, or having tools and equipment stolen, moved, etc. because of a person's gender or sexual orientation; • Causing an employee to feel stressed about a situation involving unwelcome behavior of a sexual nature.

**Definition of
Sex and
Gender:**

Sex includes, but is not limited to pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. Sex also includes, but is not limited to, a person's gender.

Gender is defined as the employee's or applicant's actual sex or the employer's perception of the employee or applicant's sex, and includes the employer's perception of the employee's or applicant's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the employee or applicant's sex at birth.

Sexual orientation means heterosexuality, homosexuality, and bisexuality.

**Roles and
Responsibilities**

Government Code Section 12940(I) requires an entity to take "all reasonable steps to prevent harassment from occurring." If an employer has failed to take such preventative measures, the employer can be held liable for the harassment. DCA managers and supervisors who do not enforce a work environment free of sexual harassment, or who do not provide adequate guidance and assistance to employees are subject to disciplinary action.

Department

The Department is responsible for:

- The actions of managers and supervisors, and for acts of other employees and non-employees if management knew or should have known of such acts and failed to take immediate and appropriate action;
- Ensuring that all employees are informed of DCA's discrimination complaint process and sexual harassment prevention policy prior to the need to know, and again when a complaint is brought forth;
- Providing complainants an opportunity to discuss the matter with a trained Equal Employment Opportunity (EEO) Counselor/Specialist;
- Investigating complaints of sexual harassment in a timely, thorough and confidential manner;
- Taking appropriate action against the harasser where a violation of the policy has occurred or sexual harassment is found;
- Taking action to remedy the situation in a manner which protects potential future victims;
- Protecting the employee(s) complaining of harassment from any form of reprisal/retaliation;
- Annually providing to all employees a copy of the ***Sexual Harassment Prevention Policy*** and ***Discrimination Policy and Complaint Procedures*** in a manner that ensures receipt of the notice;
- Conducting or sponsoring mandatory sexual harassment prevention training. Managers and supervisors are required to attend training on a more frequent basis than rank-and-file employees. The EEO Office will determine the training cycle and announce the mandatory classes for all employees.

Managers and Supervisors

All managers and supervisors have a responsibility to:

- Follow the **Procedures for Reporting a Sexual Harassment Discrimination Complaint** section listed in this document when employees report complaints of sexual harassment;
- On an **annual basis**, ensure that all employees are informed about, as well as have possession of, DCA's ***Discrimination Policy and Complaint Procedures*** and ***Sexual Harassment Prevention Policy*** prior to the need to know, and again when a complaint is brought forth;
- After each annual review of the policies, ensure that each employee reads and signs the "Acknowledgement of Receipt and Understanding" forms for each EEO policy and sends the forms to the EEO Office;
- Ensure that they and all subordinate managers/supervisors and employees attend **mandatory** sexual harassment prevention training;
- Establish and maintain a working environment that is free from discrimination, intimidation, ridicule, and insult;
- Take immediate and appropriate corrective action to prevent or stop sexual harassment. This responsibility applies even if the complaint is withdrawn or if the complainant requests that no action be taken. Once a manager/supervisor has knowledge of an alleged act of sexual harassment, he/she has a duty to follow through with a preliminary investigation and **immediately notify the EEO Office for direction**;
- Make best efforts to ensure that complaints (formal or informal) are investigated in a timely, thorough, and confidential manner and are **immediately** reported to the EEO Office.

Under State law, managers/supervisors who engage in sexual harassment may be held **personally** liable for harassment.

Employees

Under State law, any person (employee) may be personally liable for his/her own acts of unlawful harassment, including harassment based on sex or gender per Government Code Section 12940 (h). This means that a co-worker who harasses his or her colleagues may have a judgement levied against his or her own assets. Therefore, each employee has the responsibility not to engage in sexually harassing conduct.

All employees who perceive they are victims of sexually harassing behavior should understand the importance of promptly informing the individual(s) that his/her behavior is unwelcome, offensive, in poor taste, or highly inappropriate. Any employee who perceives the comments, gestures, or actions of another employee or supervisor to be sexually harassing should communicate to that person that such behavior is unwelcome. However, failure to express unwelcomeness does not prevent the employee from filing a complaint nor does it in any way exonerate the harasser.

Any employee, including a supervisor, who believes he/she has been sexually harassed or asked to perform a sexual favor, should immediately report the incident **to a supervisor**. If the harasser is the employee's supervisor or if the employee does

not feel that the situation was adequately resolved, he/she should report the incident(s) to a higher level supervisor or to the EEO Office.

Any employee who witnesses this type of behavior is strongly encouraged to report it to an appropriate supervisor. If the harasser is an employee's immediate supervisor, the witness should support the harassed employee in reporting the incident to another supervisor or to the EEO Office.

If the harasser is an employee of another agency (Board, Bureau, Commission, Division), another department in State government, or a non-employee, the harassed employee, and any employee witnessing the incident, is strongly encouraged to report the incident to the EEO Office.

**Procedures for
Reporting a
Sexual
Harassment
Discrimination
Complaint**

Filing a Complaint

Any employee who believes he/she has been sexually harassed may use the discrimination complaint process provided by DCA's EEO Office. Complaints of sexual harassment must be in writing and should be filed in accordance with the ***Discrimination Policy and Complaint Procedures***. The EEO Office has jurisdiction over a complaint if the last incident occurred within 365 days of filing.

Employees who believe they are or have been the victims of sexual harassment should report the incident promptly to their supervisors. The employee's supervisor will follow the Department's procedures to conduct a preliminary investigation of the incident and report it immediately to the EEO Office for direction.

If the alleged harasser is the employee's supervisor, the employee should immediately contact either a higher level manager/supervisor or the EEO Office.

Employees may file a written complaint directly with the DCA's EEO Office using the attached ***Discrimination Complaint Form (DCA 99K-60)*** which was revised 03/01. Employees may also concurrently file a complaint with the California Department of Fair Employment and Housing (365-day filing period), and/or the Federal Equal Employment Opportunity Commission (300-day filing period).

All criteria, including timelines and the appeal process, as specified in the ***Discrimination Policy and Complaint Procedures***, will be followed to investigate and resolve complaints of sexual harassment.

The EEO Office is responsible for providing leadership in resolving informal and formal complaints of discrimination by working with complainants, providing EEO counseling, and/or investigating complaints as necessary. A complaint can be received formally or informally, directly from the complainant, with or without the supervisor's knowledge.

A supervisor must forward a complaint of sexual harassment to the EEO Office for investigation after his/her initial review or preliminary investigation.

A third party (a witness to an incident who is offended by the conduct) can also bring a complaint to the attention of the EEO Office.

- **Contact the EEO Office immediately** to discuss the incident and your actions to date. You may be advised to meet with the alleged harasser and to put him/her on notice to immediately stop the alleged behavior. Give the alleged harasser copies of the EEO policies.
- Provide a copy of your preliminary investigation report to the EEO Office, regardless of the findings.
- Cooperate fully with the EEO Office if a formal investigation is initiated to determine the pervasiveness or severity of the alleged harassment.
- In conjunction with the EEO Office, initiate appropriate and immediate action against the alleged harasser (respondent) where sexual harassment is found.

Consequences

Violators of this policy will be subject to immediate disciplinary action, which may include letters of reprimand, suspension, demotion and/or dismissal. The violator may also be subject to civil liability.

The Department also recognizes that false accusations of sexual harassment can have a serious effect on an innocent person's reputation and character and, therefore, any individual found to have filed a false accusation/complaint may also be subject to disciplinary action. Each complaint will be evaluated on a case-by-case basis.

All employees who testify in EEO investigations are required to cooperate with the investigation and to tell the truth. Employees who do not cooperate or who compromise the integrity of the investigation by violating confidentiality may be subject to disciplinary action.

Supervisors/managers may be subject to disciplinary action for failure to take appropriate and expedient corrective action to ensure a safe work place.

Revision

Determination of the need for revision of this policy is the responsibility of the Chief, Equal Employment Opportunity (EEO) Office. Questions about the status or maintenance of this policy should be directed to the Policy, Research and Planning Program at (916) 327-6051. Questions about specific sexual harassment issues should be directed to the EEO Office at (916) 322-9861 or to the EEO hotline at 1-(888) 226-5001.

Attachments

Attached are the following:

- ***EEO Discrimination Complaint Form, DCA 99K-60 (Rev. 03/01)***
- ***Discrimination Complaint Process Statement of Rights Form, DCA 99K-70, (Rev. 03/01)***
- ***Annual Acknowledgement of Receipt and Understanding of the Sexual Harassment Prevention Policy Form, DCA 99K-80 (Rev. 10/03)***

Every employee must acknowledge that he/she has read and understood this policy **on an annual basis**. Please complete, sign and date the acknowledgement form and return it to the EEO Office as indicated on the form.

Responding to Complaints:

The EEO Office is responsible for developing and implementing a plan to resolve discrimination complaints. Based on the nature of the allegations, the plan can include: (1) EEO counseling, (2) informal complaint resolution procedures, or (3) formal complaint investigation and findings.

Throughout the investigation, only people who have a business need to know will be informed of the investigation and everyone with whom the investigator talks will be required to keep the investigation confidential.

Role of the Manager/Supervisor in Complaints of Sexual Harassment:

When a complaint of sexual harassment is brought to the attention of a manager/supervisor, it is the manager's/supervisor's responsibility to:

- Listen to the complaint as soon as it is brought to your attention. Do not postpone the meeting with the alleged victim.
- Do not promise confidentiality or anonymity, although you can promise discretion. Inform the employee that the Department must take appropriate action even if the employee insists that no investigation occur or that nothing be done.
- Permit the employee to tell his/her story without interruption.
- Listen objectively. Do not judge the employee or imply that the employee may have "asked for it" or invited the alleged advances or conduct.
- Document the incident. Obtain the details of the alleged harassment, the names of possible witnesses, and a description of how the alleged harassment affected the employee's well being and work environment. Ask for any documentation from the complainant to support the allegations.
- Ask the employee to describe his/her current and/or former relationship with the alleged harasser and whether that person is a co-worker, supervisor, subordinate, or friend. Determine if the parties have had any other difficulties working together.
- Ask the employee if he/she objected verbally to the alleged conduct or indicated to the alleged harasser that the conduct was unwanted or unwelcome.
- Determine the remedy sought by the employee.
- Assure the employee that you take the matter seriously and will make an immediate inquiry into the allegation. Notify the employee that you will contact and seek the assistance of the DCA's EEO Office.
- Advise the employee of his/her right to file a formal discrimination complaint. Provide the employee with a copy of the Department's ***Sexual Harassment Prevention Policy and the Discrimination Policy & Complaint Procedures***, including the ***Statement of Rights (99K-70)***.
- Remind the employee of his/her right to be free from reprisal/retaliation for complaining. Advise the employee that he/she should immediately bring any incidents of reprisal/retaliation to your attention.
- Advise the employee of his/her right to use the services of the Employee Assistance Program (EAP). Document the reminder.
- Record and document the complaint and perform an immediate preliminary investigation to determine the validity of the complaint. Document all reminders that the employee has a right to file a formal discrimination complaint, the right to be free from retaliation, and the right to a harassment free work environment.



EQUAL EMPLOYMENT OPPORTUNITY (EEO) OFFICE DISCRIMINATION COMPLAINT FORM

☐ INFORMAL

☐ FORMAL

Instructions: This form must be filed with the Department of Consumer Affairs (DCA) Equal Employment Opportunity (EEO) Office within 365 days of the last incident of discrimination.
Submit form to DCA EEO Office, 400 R STREET, Suite 3130, Sacramento, CA 95814.

I. COMPLAINANT INFORMATION:

Name:	Classification:
Office:	Unit or Section:
Work Address:	Work Telephone: ()
Home Address:	Home Telephone: ()
Immediate Supervisor:	

II. BASIS OF DISCRIMINATION: Check appropriate box(es).

<input type="checkbox"/> Age (40 years or older)	<input type="checkbox"/> Marital Status	<input type="checkbox"/> Race	<input type="checkbox"/> Sexual Harassment
<input type="checkbox"/> Ancestry	<input type="checkbox"/> National Origin	<input type="checkbox"/> Religion	<input type="checkbox"/> Sexual Orientation
<input type="checkbox"/> Color (Skin color)	<input type="checkbox"/> Political Affiliation/Opinion	<input type="checkbox"/> Retaliation	<input type="checkbox"/> Medical Condition
<input type="checkbox"/> Disability	<input type="checkbox"/> Pregnancy	<input type="checkbox"/> Sex (Gender)	<input type="checkbox"/> Harassment (Specify basis)

III. PERSON (S) RESPONSIBLE FOR THE ALLEGED ACTION:

NAME	CLASSIFICATION	WORK LOCATION	PHONE NUMBER

-Over-

IV. DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE:

DAY _____ *MONTH* _____ *YEAR* _____

V. DESCRIPTION OF DISCRIMINATION: *Describe fully the alleged discriminatory act and/or violation. Provide what reason or evidence you have to support your feeling that discrimination occurred. Please include dates. (Attach additional pages, if necessary.)*

VI. PERSON (S) WHO HAVE INFORMATION OR KNOWLEDGE OF THE ALLEGED DISCRIMINATION: *List name (s) of witness (es).*

<i>NAME</i>	<i>CLASS</i>	<i>WORK #</i>

VII. REMEDY REQUESTED: *Describe your desired outcome.*

VIII. COMPLAINANT SIGNATURE:

I believe the foregoing to be true and correct to the best of my knowledge.

Complainant's Signature

Date

DISCRIMINATION COMPLAINT PROCESS
STATEMENT OF RIGHTS

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With regard to compliance of discrimination, all employees are assured of the following rights:

1. The right to an informal, confidential presentation of the complaint to a qualified EEO Counselor/EEO Specialist, using a reasonable amount of State time.
2. The right to a confidential complaint until:
 - Such time as the complainant gives permission to release information in order to bring the complaint to the appropriate authority for remedy; or
 - Such time as a formal complaint is filed; or
 - Such time as appropriate action must be taken to resolve the situation.

In some cases, (i.e., sexual harassment), the complainant should be aware that complete confidentiality cannot be assured because of the legal obligation to take immediate and corrective action.

3. The right to a full, impartial, and prompt investigation by a trained EEO Specialist, if a formal complaint is filed.
4. The right to a notification of the findings.
5. The right to a timely decision from the appointing power, or authority designated by the appointing power, after full consideration of all relevant facts and circumstances.
6. The right to representation by a person of the complainant's own choosing at each step of the process.
7. The right to file concurrent complaints with the Equal Employment Opportunity Commission (EEOC), the Department of Fair Employment and Housing (DFEH), and the State Personnel Board (SPB), or other appropriate State and Federal compliance agencies; or to file a civil action in the appropriate court.
8. The right to appeal the appointing power's decision to the SPB, Appeals Division.
9. Freedom from influence to refrain from filing a complaint, and freedom from reprisal/retaliation for opposing discrimination and filing a complaint. Complaints of reprisal/retaliation may be filed directly with the SPB.

A complainant is obligated to provide accurate and factual information during all phases of the complaint process.

I have read and understand these rights.

Complainant's Signature _____

Date: _____ **Board/Bureau/Division/Program** _____

ANNUAL
***ACKNOWLEDGEMENT OF RECEIPT AND UNDERSTANDING OF
SEXUAL HARASSMENT PREVENTION POLICY***

This is to acknowledge receipt of the Department's Sexual Harassment Prevention Policy.

I have read this policy and understand that:

- 1) Every employee has the right to work in an environment free from sexual harassment;
- 2) I have a responsibility not to engage in behaviors that constitute sexual harassment;
- 3) If I feel I am being harassed, I have the right, and understand that the Department strongly encourages me, to either communicate this directly to the harasser, to my supervisor, to a non-involved supervisor/manager, or to the Department's Equal Employment Opportunity (EEO) Office;
- 4) I have the right to file a sexual harassment complaint without threat of reprisal or retaliation.

(Printed Name)

(Signature) Please complete in Ink

(Date)

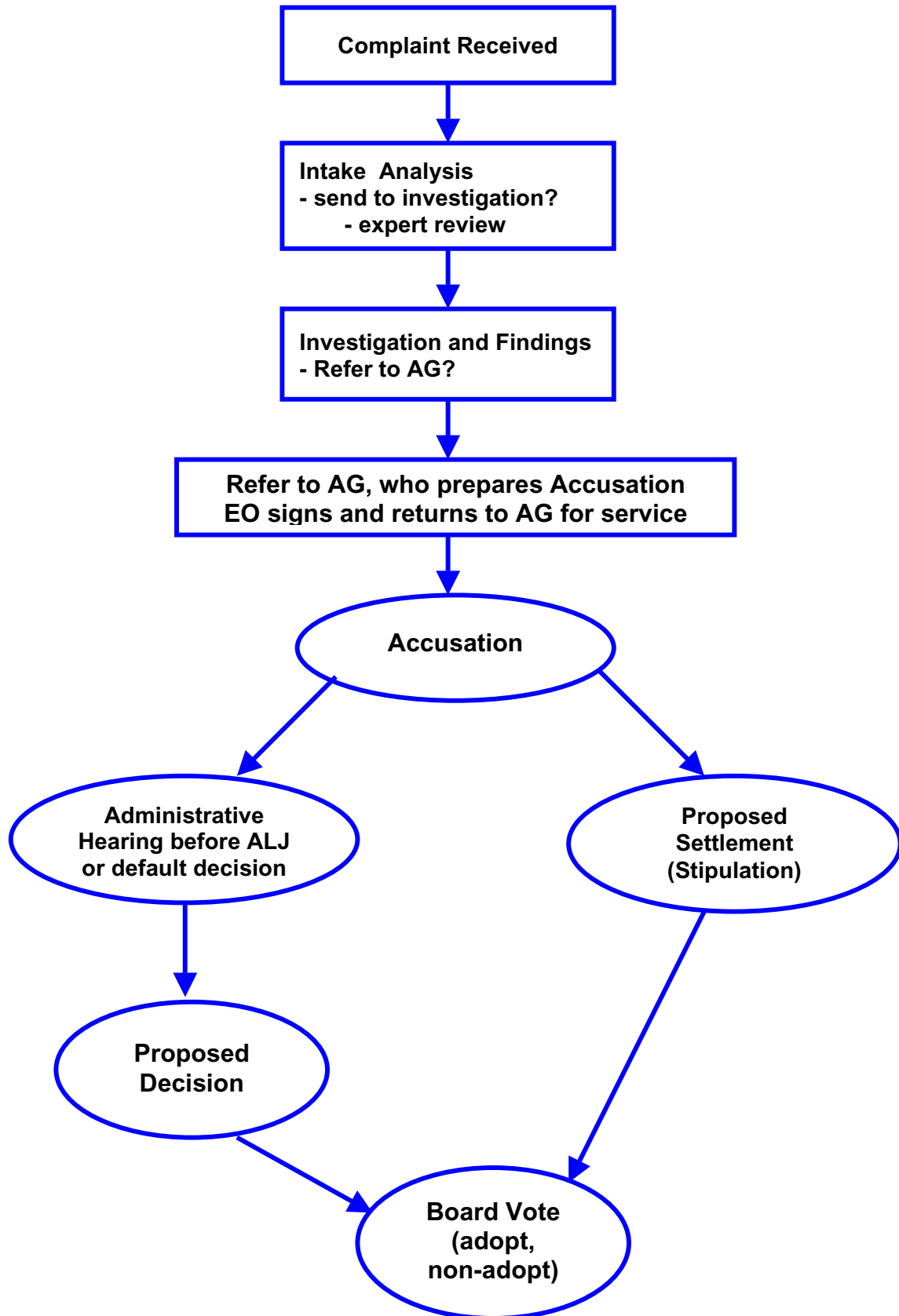
Board/Bureau/Division/Program

COMPLETED FORM SHOULD BE RETURNED TO:

Department of Consumer Affairs
Equal Employment Opportunity (EEO) Office
400 R Street, Suite 3130
Sacramento, CA 95814

Note: This document will be inserted into your Official Personnel File.

DISCIPLINARY PROCESS



FACTORS TO CONSIDER WHEN DECIDING WHETHER TO ADOPT OR NONADOPT A PROPOSED DECISION

A. Consider adopting an ALJ's proposed decision where:

1. The summary of the evidence supports the findings of fact, and the findings support the conclusions of law.
2. The law and standards of practice are interpreted correctly.
3. In those cases in which witness credibility is crucial to the decision (such as in sexual misconduct cases), the findings of fact include a determination based substantially on a witness' credibility, and the determination identifies specific evidence of the observed demeanor, manner, or attitude of the witness that supports the credibility determination.
4. The penalty fits within the disciplinary guidelines or any deviation from those guidelines has been adequately explained.
5. If probation is granted, the terms and conditions of probation provide the necessary public protection.
6. The costs of proceeding with nonadoption far exceed the severity of the offense and the probability is high that respondent will be successful.

B. Consider nonadopting an ALJ's proposed decision where:

1. The proposed decision reflects the ALJ clearly abused his/her discretion.
2. The ALJ made an error in applying the relevant standard of practice for the issues in controversy at the hearing.
3. Witness credibility is crucial to the decision (such as in sexual misconduct cases), the findings of fact include a determination based substantially on a witness' credibility, but the determination does not identify specific evidence of the observed demeanor, manner, or attitude of the witness that supports the credibility determination.
4. The ALJ made an error in interpreting the licensing law and/or regulations.
5. The ALJ made correct conclusions of law and properly applied the standards of practice but the penalty is substantially less than is appropriate to protect the public.

Rev. 4-30-04

**SUGGESTIONS FOR REVIEWING THE RECORD
AND PREPARING TO DISCUSS AND RENDER
A DECISION AFTER NONADOPTION**

(February 1, 2005)

Background:

When Board members question the factual or legal findings of the administrative law judge (ALJ) and nonadopted the proposed decision, the following suggestions are intended to assist you in reviewing the case record in an efficient and more effective manner:

Read the Administrative Record (in the following order)

1. The Accusation
 - A. Make written notes of the code sections charged and brief description of what they cover. (B&P Section 2234(b) - gross negligence; B&P Section 2242 - prescribing w/o medical exam.)
 - B. Read the facts that are alleged to prove the code violations. The burden to prove the violations by "clear and convincing evidence to a reasonable certainty" is on the Board.

2. The Proposed Decision

If "gross negligence," "repeated negligent acts," or "substantially-related" conduct is alleged, expert testimony is necessary to prove the violations.

 - A. Factual findings
 - Did the ALJ find the facts were proven by clear and convincing evidence? If not, why not?
 - Was sufficient evidence introduced to prove the facts?
 - Did the witnesses' testimony prove the facts?
 - Did the ALJ find some witnesses more credible than others? If so, why?
 - To which expert's testimony did the ALJ give the most weight?
 - Was any evidence of mitigation introduced by the respondent?

Pay close attention to the ALJ's factual findings as you will need to evaluate them when you read the transcript.
 - B. Legal conclusions (determination of issues)
 - Do the facts proven constitute a violation of the code section?
 - C. Order
 - Does the Order contain the appropriate penalty given the violations found?
 - Is the Order consistent with the Disciplinary Guidelines and, if not, is there a basis in the record for deviating from the guidelines?

3. The Transcript

Make frequent notes – "Is the evidence introduced proving the facts and the violations alleged?"

 - A. Sufficiency of the Evidence
 - Has "clear and convincing evidence to a reasonable certainty" been introduced to prove each factual allegation? You must be able to identify clear and convincing evidence in the record to support a finding.

B. Lay Witnesses

- Does the witness testimony prove the facts (keep in mind the ALJ's credibility findings)?
- If not, what evidence supports your conclusion as to who is more credible?

C. Expert Witnesses

- Which expert's testimony was given the most weight by the ALJ? Why or why not?
- If you do not agree, what evidence in the record supports your conclusion?

Preparation before the Oral Argument hearing:

1. Written Arguments

- A. The Deputy's argument will contend the facts are clearly proven and constitute a violation of the law. The burden of proof is on the Board. Has that burden (clear and convincing evidence) been met?
- B. The Respondent's argument will likely focus on the weaknesses of the Board's case and the strength of the respondent's case. It will force you to answer the hard questions whether (a) the facts were proven, (b) the law was violated, and (c) the penalty is appropriate.

2. Again Review the Proposed Decision

You should now have a complete picture of the case. Make notes on the proposed decision where you agree and disagree with the ALJ as to the factual findings, the legal conclusion, and the proposed penalty. If you disagree, note the specific evidence in the record that supports your conclusion. *You should also note the volume and page number of the transcript.* You must cite "clear and convincing evidence to a reasonable certainty" to make a finding.

3. Oral Arguments (Medical Board and Board of Psychology)

The oral arguments made by respondent's attorney and DAG typically highlight points made in the written argument. Board members may ask questions to clarify matters that may be confusing. ***You may not ask questions that seek information that is not part of the existing record.***

4. Summary and Conclusion

During your review, keep in mind the code sections alleged to have been violated and the facts alleged to have occurred. If you keep this as your focus, your evaluation of all the elements of the case should make your decision much easier. This will also help your decision withstand judicial scrutiny.

ORAL ARGUMENT ON NON-ADOPTION OF PROPOSED DECISION

[REDACTED]
90 Days Expires [REDACTED]
Administrative Law Judge - [REDACTED]
Respondent's Attorney - [REDACTED]
Deputy Attorney General [REDACTED]

COMMENTS PROVIDED BY PANEL AFTER READING TRANSCRIPT

- [REDACTED]
- Aristeiguieta: 1) Page 4 of the Petition for Penalty Relief (narrative statement), Petitioner is aloof, does not accept responsibility, and only talks about his loss and hardship.
- 2) Page 10, line 14, Respondent gives two sentences acknowledging his culpability as an error in judgment. He then explains for the next six pages how he has been harmed, not once talking about how he harmed his patient.
- 3) On cross-examination (page 17), Respondent shows that he has not taken any action to restore his privileges or standing with insurance carriers. He has not shown that the suspension is the reason that he does not make enough money. Dr. [REDACTED] wants to end probation early to clear his name, not to serve his community.
- 4) Page 19 - Respondent knew what he was doing was wrong and a violation of the Medical Practice Act. He said that "she knew it was wrong, and she sort of, you know, convinced me to take care of her," shifting blame to the victim (lines 18-20). He admits on lines 23 & 24 that he should have sent her to a colleague but he did not do so.
- 5) Page 20, Dr. [REDACTED] shifts blame to lack of medical school training and a borderline personality disorder.
- 6) Page 21, Dr. [REDACTED] now shifts blame to dating difficulties following his divorce.
- 7) Page 3 of Proposed Decision. Judge [REDACTED] notes that Petitioner has paid personal and professional costs of his actions. There is no evidence that the respondent even understands how he harmed his patient and profession anywhere on the transcript, the Petition, or the Proposed Decision.
- [REDACTED]

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of the State of California
2 ALFREDO TERRAZAS, State Bar No. 078043
Deputy Attorney General
3 California Department of Justice
1515 Clay Street, Suite 2000
4 Oakland, California 94612
Telephone: (510) 622-2220
5 Facsimile: (510) 622-2121

6 Attorneys for Complainant

STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO October 29 20 01
BY Alene Moore ANALYST

7
8 BEFORE THE
9 MEDICAL BOARD OF CALIFORNIA
10 DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

11 In the Matter of the Accusation Against:

Case No. [REDACTED]

12 ACCUSATION

13 [REDACTED]
14 Physician and Surgeon Certificate No. [REDACTED]

15 Respondent

16
17 Complainant alleges:

18 PARTIES

19 1. Complainant Ronald Joseph ("Complainant") is the Executive Director of
20 the Medical Board of California ("Board") and brings this Accusation solely in his official
21 capacity.

22 2. On or about August 1, 1977, Physician and Surgeon's Certificate No.
23 [REDACTED] was issued by the Board to respondent [REDACTED] ("respondent"), and
24 at all times relevant to the charges brought herein, this license has been in full force and effect.
25 Respondent's license is currently valid, with an expiration date of March 31, 2002.

26 //

27 //

28 //

JURISDICTION

3 This Accusation is brought before the Division of Medical Quality
4 ("Division") of the Board under the authority of the following sections of the Business and
5 Professions Code ("Code"):

6 A. Section 2227 of the Code provides that a licensee who is found guilty
7 under the Medical Practice Act may have his license revoked, suspended for a period not
8 to exceed one year, placed on probation and ordered to pay the costs of probation
9 monitoring, or subjected to such other action taken in relation to discipline as the
10 Division deems proper.

11 B. Section 2234 of the Code provides that the Division shall take action
12 against any licensee who is charged with unprofessional conduct and that unprofessional
13 conduct includes, but is not limited to, the following:

14 "(b) Gross Negligence

15 "(c) Repeated negligent acts.

16 "(d) Incompetence"

17 C. Section 2236(a) of the Code, provides, in part, that the conviction of any
18 offense substantially related to the qualifications, functions, or duties of a physician and
19 surgeon constitutes unprofessional conduct within the meaning of the Medical Practice
20 Act and that the record of conviction shall be conclusive evidence only of the fact that the
21 conviction occurred. Section 2236(c) of the Code provides, in part, that the division may
22 inquire into the circumstances surrounding the commission of a crime in order to fix
23 the degree of discipline or to determine if the conviction is substantially related to the
24 qualifications, functions or duties of a physician and surgeon.

25 D. Section 2239(a) of the Code provides, in pertinent part, as follows: "The
26 use . . . of alcoholic beverages, to the extent, or in such a manner as to be dangerous or
27 injurious to the licensee, or to any other person, or to the public, or to the extent that such
28 use impairs the ability of the licensee to practice medicine safely . . . constitutes
unprofessional conduct."

1 E. Section 2350(e) of the Code provides that any physician and surgeon
 2 terminated from the Board's Diversion Program for failure to comply with program
 3 requirements is subject to disciplinary action by the division for acts committed before,
 4 during, and after participation in the diversion program.

5 F. Section 2354 of the Code states: "Each physician and surgeon who
 6 requests participation in a diversion program shall agree to cooperate with the treatment
 7 and monitoring program designated by the program manager. Any failure to complete
 8 successfully a treatment and monitoring program may result in the filing of an accusation
 9 for discipline which may include any acts giving rise to the original diversion."

10 G. Section 125.3 of the Code provides, in part, that the Board may request
 11 the administrative law judge to direct any licentiate found to have committed a violation
 12 or violations of the licensing act to pay the Board a sum not to exceed the reasonable
 13 costs of the investigation and enforcement of the case. A certified copy of the actual
 14 costs, or a good faith estimate of costs where the actual costs are not available, signed by
 15 the Board or its designated representative shall be *prima facie* evidence of reasonable
 16 costs of investigation and prosecution of the case. The costs shall include the amount of
 17 investigative and enforcement costs up to the date of the hearing, including, but not
 18 limited to, charges imposed by the Attorney General.

19 4. Section 14124.12 of the Welfare and Institutions Code provides:

20 "(a) Upon receipt of written notice from the Medical Board of California, the
 21 Osteopathic Medical Board of California, or the Board of Dental Examiners of California
 22 that a licensee's license has been placed on probation as a result of disciplinary action,
 23 the department may not reimburse any Medi-Cal claim for the type of surgical service
 24 or invasive procedure that gave rise to the probation, including any dental surgery or
 25 invasive procedure, that was performed by the licensee on or after the effective date
 26 of the probation and until the termination of all probationary terms and conditions or
 27 until the probationary period has ended, whichever comes first. This section shall apply
 28 except in any case in which the relevant licensing board determines that compelling
 circumstances warrant continued reimbursement during the probationary period of any
 Medi-Cal claim, including any claim for dental services, as so described. In such a case,
 the department shall continue to reimburse the licensee for all procedures, except for
 those invasive or surgical procedures for which the licensee was placed on probation.

"(b) The Medical Board of California, the Osteopathic Medical Board of
 California, and the Board of Dental Examiners of California shall work in conjunction
 with the State Department of Health Services to provide all information that is necessary

to implement this section. The boards and the department shall annually report to the Legislature by no later than March 1 the number of licensees of these boards placed on probation during the immediately preceding calendar year, who are:

"(1) Not receiving Medi-Cal reimbursement for certain surgical services or invasive procedures, including dental surgeries or invasive procedures, as a result of subdivision (a).

"(2) Continuing to received Medi-Cal reimbursement for certain surgical or invasive procedures as a result of a determination of compelling circumstances made in accordance with subdivision (a).

"(c) This section shall become inoperative on July 1, 2003, and as of January 1, 2004 is repealed, unless a later enacted statute that is enacted before January 1, 2004, deletes or extends the dates on which it becomes inoperative and is repealed."

RESPONDENT'S SUBSTANCE ABUSE HISTORY

5. Respondent took his first alcoholic drink at the age of 19. During his undergraduate years, he drank at social functions and experimented with hallucinogens, Cannabis, and amphetamines.

6. During the first two years of medical school, respondent drank alcoholic beverages frequently and smoked Cannabis daily. In the third and fourth years of medical school, respondent ceased smoking Cannabis, but continued to drink alcoholic beverages frequently.

7. At age 28, respondent noticed that his drinking was escalating, and he began to smoke Cannabis again. At age 31, he was introduced to cocaine. In 1982, respondent married and began a family. Respondent continued to drink alcoholic beverages and found he could not stop. Respondent's wife was also alcoholic, but she did not drink during her pregnancies and was more successful at remaining sober overall.

8. He began an "ER" physician's registry, [REDACTED] where he was Chief Executive Officer, sending physicians to hospital emergency rooms that needed staffing. He traveled extensively and frequently filled in at emergency rooms. His work became more stressful with greater success. He typically drank alcohol at lunch and again at 4:00 or 5:00 p.m. Then, he would go to a local bar for mixed drinks and then go home. Sometimes he would buy a half pint of gin before going home and consume as much as half the bottle in the car on his way home. He also intermittently used cocaine. This pattern persisted

1 until December 1995.

2 9. In December of 1995, respondent realized his drinking was out of control
3 and entered a 21 day treatment program at Sierra Tucson in Arizona. He only attended two
4 weeks, but after treatment, he attended AA meetings and [REDACTED] support groups. In
5 January of 1996, respondent stopped attending AA meetings and Boynton's groups and once
6 again resumed drinking alcoholic beverages heavily. In late 1997, respondent's wife filed for
7 legal separation because of his uncontrolled drinking, but the couple were never physically
8 separated.

9 **FIRST CAUSE FOR DISCIPLINE**

10 (Conviction of a Substantially Related Crime)

11 10. On or about January 3, 2000, respondent began drinking alcoholic
12 beverages early in the morning on his way to an emergency room shift in Susanville, California.
13 Respondent drove from his home to the airport to catch a flight to Reno, Nevada. Once in Reno,
14 respondent rented a car to drive to Susanville, and he bought and consumed cognac and other
15 alcoholic drinks. On State Route (SR) 139, approximately 7.5 miles south of Eagle Lake Road,
16 respondent was driving at about 70 m.p.h., northbound, and did not note a 35 m.p.h. warning sign
17 before a right bend in the road. He drove into the bend too fast, lost control of the rental car, and
18 hit the embankment on the east side of the road. The car rolled over on its top and came to rest
19 in the northbound lane of SR 139, facing in a southeasterly direction. This occurred at
20 approximately 8:15 p.m.

21 11. California Highway Patrol officer [REDACTED] arrived at the scene at
22 approximately 8:55 p.m. and noted that respondent had cuts and scrapes on his hands and that his
23 breath smelled of alcohol. Officer [REDACTED] noted that respondent had blood shot, watery eyes and
24 a slight slur to his speech. He asked respondent whether he had been drinking and how much,
25 and respondent replied, "Too much." Respondent failed a field sobriety test. Officer [REDACTED]
26 arrested respondent for a violation of Vehicle Code section 23152(a) [Operating a Motor Vehicle
27 While Intoxicated] and explained to respondent his rights. Respondent chose to take a blood test,
28 and officer [REDACTED] transported him to [REDACTED] Hospital, where a blood sample was

1 taken at approximately 10:10 p.m. and where respondent's cuts and scrapes were treated.
2 Respondent was then taken to the Lassen County Jail, where he was booked and spent the next
3 eight hours. Respondent's blood alcohol content, by blood test, was found to be .16%.

4 12. On or about February 3, 2000, a complaint was filed in Lassen County
5 Municipal Court charging respondent with a violation of Vehicle Code section 23152(a).
6 Respondent failed to appear at his arraignment on February 14, 2000, and a bench warrant was
7 issued on February 16, 2000. The arraignment was reset for March 6, 2000, and the warrant was
8 recalled on waiver of respondent's personal presence by his counsel. On or about July 10, 2000,
9 respondent pleaded guilty to a misdemeanor violation of Vehicle Code section 23152(a) and was
10 sentenced to 36 months summary probation, five days in the county jail, a fine of \$1418.00, a
11 drinking driver's program, a license restriction for 90 days, and no alcohol.

12 13. Respondent's conduct, as set forth above, constitutes the conviction of a
13 crime substantially related to the qualifications, functions and duties of a physician and surgeon
14 and therefore cause exists for disciplinary action pursuant to sections 2236(a) and 2234 of the
15 Code.

16 **SECOND CAUSE FOR DISCIPLINE**

17 (Use of Alcohol)

18 14. The allegations contained in paragraphs 10 through 12, above, are
19 incorporated herein by reference as if fully set forth.

20 15. Respondent's conduct, as set forth above, constitutes the use of alcoholic
21 beverages to the extent or in such a manner as to be dangerous to himself, others, and to the
22 public, and/or to the extent that such use impaired the ability of respondent to practice medicine
23 safely, and therefore cause exists for discipline pursuant to sections 2239(a) and 2234 of the
24 Code.

25 //

26 //

27 //

28 //

THIRD CAUSE FOR DISCIPLINE

(Gross Negligence)

16. The allegations of paragraphs 5 through 12, above, are incorporated herein by reference as if fully set forth.

17. Respondent's conduct, as set forth above, constitutes gross negligence in that he intended to practice medicine (as in driving to a shift at the emergency room) and/or did practice medicine while under the influence of alcohol and impaired by such use, thereby endangering patients and others under his supervision and care. Therefore, cause exists for discipline pursuant to section 2234(b) of the Code.

FOURTH CAUSE FOR DISCIPLINE

(Unsuccessful Termination from Diversion)

18. On or about January 14, 2000, respondent ceased clinical practice and began attending meetings of the Board's Diversion Program. On or about January 27, 2000, respondent self-referred himself to the Diversion Program. On or about February 25, 2000, respondent's formal participation was approved by his Diversion Evaluation Committee (DEC).

19. On or about March 3, 2000, respondent signed a Physician's Diversion Program Agreement. Term 22 of that agreement states: "If I am a self-referral who is unknown to the Medical Board through Enforcement or other related activity and I am terminated from the Program by the DEC for any reasons other than successful completion of the program, and the DEC determines I am unable to practice medicine safely, the fact of my termination will be reported to the Medical Board." Respondent was directed by the DEC to enter an in-patient treatment program at Springbrook Northwest within 14 days, and his license was limited to administrative duties until the next DEC meeting after the in-patient treatment was complete. Respondent successfully completed the in-patient program in July 2000 and was discharged.

20. On or about September 26, 2000, respondent requested that the DEC allow him to return to administrative functions at [REDACTED], and on or about October 2, 2000, respondent was granted 24 hours per week, with reports from a worksite monitor and no clinical duties.

1 21. On or about December 15, 2000, respondent had a meeting with the DEC
2 for a re-evaluation post in-patient treatment. The DEC approved 20 hours per week
3 administrative duties with one clinical shift per week at one location. Reports from the worksite
4 monitor continued. A further review was held on or about February 9, 2001, wherein it was
5 found that respondent was using his recovery program to deal with work related stresses and that
6 respondent's program should continue unchanged.

7 22. On or about February 20, 2001, respondent reported to his group facilitator
8 that he had relapsed and had consumed alcoholic beverages on February 19th and 20th.
9 Respondent cited work stressors as leading to his relapse. The relapse was reported to
10 respondent's case manager, who informed program staff and respondent's case consultant. The
11 case manager instituted a plan whereby respondent would cease clinical practice and
12 administrative travel immediately and recommended a return to Springbrook Northwest for in-
13 patient treatment. The DEC was advised of the relapse and was requested to follow up.

14 23. On or about February 23, 2001, the DEC met and discussed respondent's
15 relapse. The DEC wrote respondent, encouraging him to return to Springbrook Northwest
16 despite certain resentments he harbored about that treatment program. On or about February 26,
17 2001, respondent met with the case manager and the group facilitator and announced that he had
18 no plans to continue with the Diversion Program at that time. Respondent continued to refuse to
19 return to the Springbrook treatment facility, and effective April 10, 2001, the DEC terminated
20 respondent unsuccessfully from the Diversion Program.

21 24. On or about April 23, 2001, the Program Manager of the Board's
22 Diversion Program notified the Medical Board's enforcement program that respondent was
23 terminated from the Diversion Program for reasons other than successful completion and that
24 respondent presented a threat to public health or safety.


25 25. Respondent's conduct, as described above constitutes a failure to
26 cooperate with the requirements of the Diversion Program and a failure to successfully complete
27 his diversion program. Therefore, cause exists for discipline pursuant to section 2354 of the
28 Code.

PRAYER

WHEREFORE, complainant requests that a hearing be held on the matters herein alleged, and that following that hearing, the Division issue a decision:

1. Revoking or suspending Physician and Surgeon Certificate No. [REDACTED] heretofore issued to respondent [REDACTED]
2. Prohibiting respondent from being the supervisor of a physician assistant;
3. Ordering respondent to pay the Division the actual and reasonable costs of investigation and enforcement of this case, and if placed on probation, the costs of probation monitoring; and
4. Taking such other and further action as the Division deems necessary and proper.

DATED: October 29, 2001



RONALD JOSEPH
Executive Director
MEDICAL BOARD OF CALIFORNIA
Department of Consumer Affairs
State of California

Complainant

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

[REDACTED]

Case No. [REDACTED]

Physician's and Surgeon's Certificate No.

[REDACTED]

OAH No. [REDACTED]

Respondent.

PROPOSED DECISION

This matter was heard before Ruth S. Astle, Administrative Law Judge of the Office of Administrative Hearings, State of California on August 29 and 30, 2003 in Oakland, California

Kerry Weisel, Deputy Attorney General, represented the complainant.

Albert J. Garcia, Attorney at Law, represented the respondent who was present.

Submission of the matter was deferred to October 7, 2003, for receipt of final argument, which was received and considered.

FACTUAL FINDINGS

1. Ronald Joseph (complainant made this accusation in his official capacity as the Executive Director of the Medical Board of California (Board), and not otherwise.
2. On August 1, 1977, the Board issued Physician and Surgeon's Certificate to respondent [REDACTED] (respondent). Respondent's license was in full force and effect at all times relevant to this accusation and is currently valid, with an expiration date of March 31, 2004.
3. It was stipulated by the parties that respondent's conviction on July 10, 2000, for misdemeanor violation of Vehicle Code section 23152(a) (Driving under the influence) is substantially related to his duties, qualification and functions as a licensee and that there is cause to impose disciplinary action. The issue is to determine what is an appropriate disciplinary order in this matter.

4. Respondent has a significant history of alcohol abuse. Respondent was involved in an automobile accident while under the influence of alcohol. After the incident he enrolled in the MPI Alcohol Treatment Program in Oakland. He also contacted the Medical Board Diversion Program. He completed an outpatient program at MPI that included group and individual therapy and the attendance at AA meetings. In March of 2000 respondent entered an inpatient program in Oregon at the request of the Diversion Program. After the initial inpatient hospital program, respondent entered a monitored residential living program. Respondent successfully completed the program in July 2000.

5. In February 2001 respondent relapsed. He reported his relapse to the Diversion Program. The Diversion Program asked respondent to return to the inpatient program in Oregon. Respondent did not want to return, in large part due to his responsibility for his two teenaged daughters. It was a great hardship for him to be away from them for so long the first time. He proposed an alternative program including AA, outpatient treatment, random testing and therapy, but Diversion turned him down and insisted on Springbrook. Respondent refused and ultimately was terminated from diversion.

6. It was not established by clear and convincing evidence that respondent was under the influence of alcohol and/or impaired by the use of alcohol in connection with any shift at any emergency room. Nor is there any evidence that respondent ever endangered patients or others under his supervision and care.

7. At the request of the Medical Board respondent was examined and evaluated by [REDACTED] M.D. Dr. [REDACTED] found that with respondent's history of alcohol abuse that there is no guarantee under any program that respondent would be completely successful. However, Dr. [REDACTED] concluded that a program constructed by the respondent that would protect the public would have a greater chance of success because patient acceptance tends to increase patient compliance.

8. Respondent is presently serving as a Regional Medical Director for [REDACTED] a company that he founded. He has three hospitals under his administration. The company supplies emergency room physicians to hospitals in California. At the time of the incident set forth in Finding 3, above, respondent was running the company. He was under a great deal of stress. By taking on less responsibility respondent has reduced his stress level considerably.

9. Respondent has never been charged with harming a patient as a result of his alcohol abuse. He has excellent clinical skills and gets along well with his staff. He has never been under the influence of alcohol at work. He works four to six 24-hour shifts a month.

10. Respondent expressed concern for his past behavior. He is willing to be tested for alcohol at the beginning of every shift. He underwent this extensive testing at the request of his company to assure the hospitals that respondent was safe to practice. All of the tests

were negative. He has continued to participate in AA twice a week. He has been sober since February of 2001.

11. Respondent received his BA in Chemistry and Theater from McAlester College in St. Paul, Minnesota. He graduated from Harvard Medical School in 1976. Respondent did his internship at San Francisco General Hospital and is Board Certified in emergency Medicine.

12. The cost for Investigation and Prosecution requested in this matter is \$1,165.17 for investigative services. This amount is reasonable. The cost for expert review is \$3,090.17. This amount is reasonable. The cost requested for attorney services is from 2001 to present. The amount of \$14,728.00 is high based on the stipulation and other factors concerning the facts of this case including failure to establish two of the causes for discipline. \$7,500 is allowed. The total costs allowed for investigation and prosecution of this matter is \$11,755.34. This amount may be paid over the term of probation.

13. Termination from diversion is not, in and of itself, grounds for disciplinary action.

14. It would not be against the public interest to allow respondent to practice medicine under the terms and conditions set forth below.

LEGAL CONCLUSIONS

1. By reason of the matters set forth in Findings 3, 4 and 5, cause for disciplinary action exists pursuant to Business and Professions Code sections 2236(a), 2234 (conviction of a substantially related crime), and 2239(a) (Use of Alcohol).

2. By reason of the matters set forth in Finding 6, cause for disciplinary action does not exist under Business and Professions Code section 2234(b) (gross negligence).

3. By reason of the matters set forth in Finding 13, cause for disciplinary action does not exist pursuant to Business and Professions Code section 2354. Termination from the Diversion Program is not a separate ground for disciplinary action. See *Medical Board of California v. Superior Court (Liskey)* 03 C.D.O.S. 7379 (2003). While the complainant attempts to distinguish this case from that of *Liskey*, it appears clear that it is the underlying problems that are, and should be, the cause for disciplinary action not the termination from diversion, alone.

4. The matters set forth in Findings 7 through 11 and 14 in mitigation, extenuation and mitigation have been considered in making the following order. It must be noted that the mandate of the Board is to protect the public not to what they may believe is best for the respondent. The public can be protected by placing respondent on probation for a considerable period of time under terms and conditions that will assure that he does not make medical decisions under the influence of alcohol. As Dr. [REDACTED] observed (complainant's

expert witness), the respondent may never have complete control of his problem with alcohol, but if the public can be protected, there is no reason the respondent should have to be supervised by the diversion program. Further, the complainant argues that the diversion committee is made up of experts in their field and is best able to decide what is best. While they may be able to decide what is best for the individual, they don't have any special knowledge about what is required to protect the public.

5. Costs in the amount of \$11,755.34 as set forth in Finding 12 are allowed pursuant to Business and Professions Code section 125.3.

ORDER

Physician's and Surgeon's Certificate [REDACTED] issued to [REDACTED], M.D., is hereby revoked. However, the revocation is stayed for a period of 10 years upon the following terms and conditions: Within 15 days after the effective date of this decision the respondent shall provide the Division, or its designee, proof of service that respondent has served a true copy of this decision on the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent or at any other facility where respondent engages in the practice of medicine and on the Chief Executive Officer at every insurance carrier where malpractice insurance coverage is extended to respondent.

1. Alcohol - Abstain From Use

Respondent shall abstain completely from the use of alcoholic beverages.

2. Biological Fluid Testing

Respondent shall immediately submit to biological fluid testing, at respondent's cost, upon the request of the Division or its designee. Respondent shall also be tested before and after every shift.

3. Psychotherapy

Within 60 days of the effective date of this decision, respondent shall submit to the Division or its designee for its prior approval the name and qualifications of a psychotherapist of respondent's choice. Upon approval, respondent shall undergo and continue treatment until the Division or its designee deems that no further psychotherapy is necessary. Respondent must follow all recommendations of the treating psychotherapist. Respondent shall have the treating psychotherapist submit quarterly status reports to the Division or its designee. The Division or its designee may require respondent to undergo psychiatric evaluations by a Division-appointed psychiatrist.

If, prior to the termination of probation, respondent is found not to be mentally fit to resume the practice of medicine without restrictions, the Division shall retain continuing jurisdiction over the respondent's license and the period of probation shall be extended until the Division determines that the respondent is mentally fit to resume the practice of medicine without restrictions.

4. Monitoring

Within 30 days of the effective date of this decision, respondent shall submit to the Division or its designee for its prior approval a plan of practice in which respondent's practice shall be monitored by another physician in respondent's field of practice, who shall provide periodic reports to the Division or its designee.

If the monitor resigns or is no longer available, respondent shall, within 15 days, move to have a new monitor appointed, through nomination by respondent and approval by the Division or its designee.

Respondent is prohibited from engaging in solo practice.

5. Obey All Laws

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments and other orders.

6. Quarterly Reports

Respondent shall submit quarterly declarations under penalty of perjury on forms provide by the Division, stating whether there has been compliance with all the conditions of probation.

7. Probation Surveillance Program Compliance

Respondent shall comply with the Division's probation surveillance program. His addresses of business and residence which shall both serve as addresses of record. Changes of such addresses shall be immediately communicated in writing to the Division. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code Section 2021(b).

Respondent shall, at all times, maintain a current and renewed physician and surgeon license.

Respondent shall also immediately inform the Division, in writing, of any travel to any areas outside the jurisdiction of California, which lasts, or is contemplated to last, more than thirty (30) days.

8. Interview with the Division, its designee or its designated physician(s)

Respondent shall appear in person for interviews with the Division, its designee or its designated physician(s) upon request at various intervals and with reasonable notice.

9. Tolling of Probation

In the event respondent should leave California to reside or to practice outside the State or for any reason should respondent stop practicing medicine in California, respondent shall notify the Division or its designee in writing within ten days of the dates of departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty days in which respondent is not engaging in any activities defined in Sections 2051 and 2052 of the Business and Professions Code. All time spent in an intensive training program approved by the Division or its designee shall be considered as time spent in the practice of medicine. A Board ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California or of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary order.

10. Completion of Probation

Upon successful completion of probation, respondent's certificate shall be fully restored.

11. Violation of Probation

If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

12. Cost Recovery

The respondent is hereby ordered to reimburse the Division the amount of \$11,755.34 in equal monthly payments over the first five years of probation for its investigative costs. Failure to reimburse the Division's cost of its investigation shall constitute a violation of the probation order, unless the Division agrees in writing to payment by an installment plan because of financial hardship. The filing of bankruptcy by the respondent shall not relieve the respondent of his/her responsibility to reimburse the Division for its investigative costs.

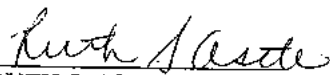
13. License Surrender

Following the effective date of this decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may voluntarily tender his/her certificate to the Board. The Division reserves the right to evaluate the respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, respondent will no longer be subject to the terms and conditions of probation.

14. Probation Monitoring Costs

The respondent shall pay the costs associated with probation monitoring each and every year of probation. Such costs shall be payable to the Division of Medical Quality and delivered to the designated probation surveillance monitor no later than January 31 of each calendar year. Failure to pay costs within 30 days of the due date shall constitute a violation of probation.

DATED: October 24, 2003


RUTH S. ASTLE
Administrative Law Judge
Office of Administrative Hearings

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

[REDACTED]

Physician's and Surgeon's Certificate No.

[REDACTED]

Respondent.

Case No. [REDACTED]

OAH No. [REDACTED]

DECISION AFTER NONADOPTION

This matter was heard before Ruth S. Astle, Administrative Law Judge of the Office of Administrative Hearings, State of California on August 29 and 30, 2003 in Oakland, California

Kerry Weisel, Deputy Attorney General, represented the complainant.

Albert J. Garcia, Attorney at Law, represented the respondent who was present.

Submission of the matter was deferred to October 7, 2003, for receipt of final argument, which was received and considered.

The proposed decision of the administrative law judge was submitted to the Division of Medical Quality, Medical Board of California (hereafter "division") on October 24, 2003. After due consideration thereof, the division declined to adopt the proposed decision and thereafter on November 10, 2003 issued an Order of Nonadoption and subsequently issued an Order Fixing Date for Submission of Written Argument. On December 30, 2003, the division issued a Notice of Time for Oral Argument. Oral argument was heard on January 29, 2004. The time for filing written argument in this matter having expired, written argument having been filed by both parties and such written argument, together with the entire record, including the transcript of said hearing, having been read and considered, pursuant to Government Code Section 11517, Panel A of the division hereby makes the following decision and order:

FACTUAL FINDINGS

1. Ronald Joseph (complainant made this accusation in his official capacity as the Executive Director of the Medical Board of California (Board), and not otherwise.
2. On August 1, 1977, the Board issued Physician and Surgeon's Certificate No. [REDACTED] to respondent [REDACTED] M.D (respondent). Respondent's license was in full force and effect at all times relevant to this accusation and is currently valid, with an expiration date of March 31, 2004.
3. - It was stipulated by the parties that respondent's conviction on July 10, 2000, for misdemeanor violation of Vehicle Code section 23152(a) (Driving under the influence) is substantially related to his duties, qualification and functions as a licensee and that there is cause to impose disciplinary action. The issue is to determine what is an appropriate disciplinary order in this matter.
4. Respondent has a significant history of alcohol abuse. Respondent was involved in an automobile accident while under the influence of alcohol. After the incident he enrolled in the MPI Alcohol Treatment Program in Oakland. He also contacted the Medical Board Diversion Program. He completed an outpatient program at MPI that included group and individual therapy and the attendance at AA meetings. In March of 2000 respondent entered an inpatient program in Oregon at the request of the Diversion Program. After the initial inpatient hospital program, respondent entered a monitored residential living program. Respondent successfully completed the program in July 2000.
5. In February 2001 respondent relapsed. He reported his relapse to the Diversion Program. The Diversion Program asked respondent to return to the inpatient program in Oregon. Respondent did not want to return, in large part due to his responsibility for his two teenaged daughters. It was a great hardship for him to be away from them for so long the first time. He proposed an alternative program including AA, outpatient treatment, random testing and therapy, but Diversion turned him down and insisted on Springbrook. Respondent refused and ultimately was terminated from diversion.
6. It was not established by clear and convincing evidence that respondent was under the influence of alcohol and/or impaired by the use of alcohol in connection with any shift at any emergency room.

7. At the request of the Medical Board respondent was examined and evaluated by [REDACTED] M.D. Dr. [REDACTED] found that with respondent's history of alcohol abuse that there is no guarantee under any program that respondent would be completely successful. However, Dr. [REDACTED] concluded that a program constructed by the respondent that would protect the public would have a greater chance of success because patient acceptance tends to increase patient compliance.

8. Respondent is presently serving as a Regional Medical Director for [REDACTED] a company that he founded. He has three hospitals under his administration. The company supplies emergency room physicians to hospitals in California. At the time of the incident set forth in Finding 3, above, respondent was running the company. He was under a great deal of stress. By taking on less responsibility respondent has reduced his stress level considerably.

9. Respondent has never been charged with harming a patient as a result of his alcohol abuse. He has excellent clinical skills and gets along well with his staff. He works four to six 24-hour shifts a month.

10. Respondent expressed concern for his past behavior. He is willing to be tested for alcohol at the beginning of every shift. He underwent this extensive testing at the request of his company to assure the hospitals that respondent was safe to practice. All of the tests were negative. He has continued to participate in AA twice a week. He has been sober since February of 2001.

11. Respondent received his BA in Chemistry and Theater from McAlester College in St. Paul, Minnesota. He graduated from Harvard Medical School in 1976. Respondent did his internship at San Francisco General Hospital and is Board Certified in emergency Medicine.

12. The cost for Investigation and Prosecution requested in this matter is \$1,165.17 for investigative services. This amount is reasonable. The cost for expert review is \$3,090.17. This amount is reasonable. The cost requested for attorney services is from 2001 to present. The amount of \$14,728.00 is high based on the stipulation and other factors concerning the facts of this case including failure to establish two of the causes for discipline. \$7,500 is allowed. The total costs allowed for investigation and prosecution of this matter is \$11,755.34. This amount may be paid over the term of probation.

13. Termination from diversion is not, in and of itself, grounds for disciplinary action.

14. It would not be against the public interest to allow respondent to practice medicine under the terms and conditions set forth below.

LEGAL CONCLUSIONS

1. By reason of the matters set forth in Findings 3, 4 and 5, cause for disciplinary action exists pursuant to Business and Professions Code sections 2236(a), 2234 (conviction of a substantially related crime), and 2239(a) (Use of Alcohol).
2. By reason of the matters set forth in Finding 6, cause for disciplinary action does not exist under Business and Professions Code section 2234(b) (gross negligence).
3. By reason of the matters set forth in Finding 13, cause for disciplinary action does not exist pursuant to Business and Professions Code section 2354. Termination from the Diversion Program is not a separate ground for disciplinary action. See *Medical Board of California v. Superior Court (Liskey)* 03 C.D.O.S. 7379 (2003). While the complainant attempts to distinguish this case from that of *Liskey*, it appears clear that it is the underlying problems that are, and should be, the cause for disciplinary action not the termination from diversion, alone.
4. The matters set forth in Findings 7 through 11 and 14 in mitigation and aggravation have been considered in making the following order. It must be noted that the mandate of the Board is to protect the public. The public can be protected by placing respondent on probation for a considerable period of time under terms and conditions that will assure that he does not make medical decisions under the influence of alcohol. Respondent's desire or need to be in control of his own rehabilitation program is part of his substance abuse problem that he still needs to address. The panel finds that participation in a structured, monitored program is necessary for public protection.
5. Costs in the amount of \$11,755.34 as set forth in Finding 12 are allowed pursuant to Business and Professions Code section 125.3.

ORDER

Physician's and Surgeon's Certificate [REDACTED] issued to [REDACTED] M.D., is hereby revoked. However, the revocation is stayed and respondent is placed on probation for a period of 10 years upon the following terms and conditions: Within 15 days after the effective date of this decision the respondent shall provide the Division, or its designee, proof of service that respondent has served a true copy of this decision on the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent or at any other facility where respondent engages in the practice of medicine and on the Chief Executive Officer at every insurance carrier where malpractice insurance coverage is extended to respondent.

1. Alcohol - Abstain From Use

Respondent shall abstain completely from the use of alcoholic beverages.

2. Controlled Substances - Abstain From Use

Respondent shall abstain completely from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act, dangerous drugs as defined by Business and Professions Code section 4022, and any drugs requiring a prescription. This prohibition does not apply to medications lawfully prescribed to respondent by another practitioner for a bona fide illness or condition.

Within 15 calendar days of receiving any lawful prescription medications, respondent shall notify the Division or its designee of the: issuing practitioner's name, address, and telephone number; medication name and strength; and issuing pharmacy name, address, and telephone number.

3. Diversion Program

Within 30 calendar days from the effective date of this Decision, respondent shall enroll and participate in the Board's Diversion Program until the Diversion Program determines that further treatment and rehabilitation are no longer necessary. The Diversion Program shall re-evaluate respondent and shall also re-evaluate whether there is any further need for an inpatient program. Upon enrollment, respondent shall execute a release authorizing the Diversion Program to notify the Division of the following: 1) respondent requires further treatment and rehabilitation; 2) respondent no longer requires treatment and rehabilitation; and 3) respondent may resume the practice of medicine. Respondent shall execute a release authorizing the Diversion Program to provide confirmation to the Division whenever the Diversion Program has determined that respondent shall cease the practice of medicine.

Within 5 calendar days after being notified by the Diversion Program of a determination that further treatment and rehabilitation are necessary, respondent shall notify the Division in writing. The Division shall retain continuing jurisdiction over respondent's license and the period of probation shall be extended until the Diversion Program determines that further treatment and rehabilitation are no longer necessary. Within 24 hours after being notified by the Diversion Program of a determination that respondent shall cease the practice of medicine, respondent shall notify the Division and respondent shall not

engage in the practice of medicine until notified in writing by the Division or its designee of the Diversion Program's determination that respondent may resume the practice of medicine. Failure to cooperate or comply with the Diversion Program requirements and recommendations, quitting the program without permission, or being expelled for cause is a violation of probation.

4. Biological Fluid Testing

Respondent shall immediately submit to biological fluid testing, at respondent's cost, upon the request of the Division or its designee.

5. Psychotherapy

Within 60 days of the effective date of this decision, respondent shall submit to the Division or its designee for its prior approval the name and qualifications of a psychotherapist of respondent's choice. Upon approval, respondent shall undergo and continue treatment until the Division or its designee deems that no further psychotherapy is necessary. Respondent must follow all recommendations of the treating psychotherapist. Respondent shall have the treating psychotherapist submit quarterly status reports to the Division or its designee. The Division or its designee may require respondent to undergo psychiatric evaluations by a Division-appointed psychiatrist. If, prior to the termination of probation, respondent is found not to be mentally fit to resume the practice of medicine without restrictions, the Division shall retain continuing jurisdiction over the respondent's license and the period of probation shall be extended until the Division determines that the respondent is mentally fit to resume the practice of medicine without restrictions.

6. Monitoring

Within 30 days of the effective date of this decision, respondent shall submit to the Division or its designee for its prior approval a plan of practice in which respondent's practice shall be monitored by another physician in respondent's field of practice, who shall provide periodic reports to the Division or its designee.

If the monitor resigns or is no longer available, respondent shall, within 15 days, move to have a new monitor appointed, through nomination by respondent and approval by the Division or its designee.

Respondent is prohibited from engaging in solo practice.

7. Obey All Laws

Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments and other orders.

8. Quarterly Reports

Respondent shall submit quarterly declarations under penalty of perjury on forms provide by the Division, stating whether there has been compliance with all the conditions of probation.

9. Probation Surveillance Program Compliance

Respondent shall comply with the Division's probation surveillance program. His addresses of business and residence which shall both serve as addresses of record. Changes of such addresses shall be immediately communicated in writing to the Division. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code Section 2021(b).

Respondent shall, at all times, maintain a current and renewed physician and surgeon license.

Respondent shall also immediately inform the Division, in writing, of any travel to any areas outside the jurisdiction of California, which lasts, or is contemplated to last, more than thirty (30) days.

10. Interview with the Division, its designee or its designated physician(s)

Respondent shall appear in person for interviews with the Division, its designee or its designated physician(s) upon request at various intervals and with reasonable notice.

11. Tolling of Probation

In the event respondent should leave California to reside or to practice outside the State or for any reason should respondent stop practicing medicine in California, respondent shall notify the Division or its designee in writing within ten days of the dates of departure and return or the dates of non-practice within California. Non-practice is defined as any period of time exceeding thirty days in which respondent is not engaging in any activities defined in Sections 2051 and 2052 of the Business and Professions Code. All time spent in an intensive training

program approved by the Division or its designee shall be considered as time spent in the practice of medicine. A Board ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California or of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary order.

12. Completion of Probation

Upon successful completion of probation, respondent's certificate shall be fully restored.

13. Violation of Probation

If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an accusation or petition to revoke probation is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

14. Cost Recovery

The respondent is hereby ordered to reimburse the Division the amount of \$11,755.34 in equal monthly payments over the first five years of probation for its investigative costs. Failure to reimburse the Division's cost of its investigation shall constitute a violation of the probation order, unless the Division agrees in writing to payment by an installment plan because of financial hardship. The filing of bankruptcy by the respondent shall not relieve the respondent of his/her responsibility to reimburse the Division for its investigative costs.

15. License Surrender

Following the effective date of this decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may voluntarily tender his/her certificate to the Board. The Division reserves the right to evaluate the respondent's request and to exercise its discretion whether to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances. Upon formal acceptance of the tendered license, respondent will no longer be subject to the terms and conditions of probation.

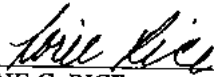
16. Probation Monitoring Costs

The respondent shall pay the costs associated with probation monitoring each and every year of probation. Such costs shall be payable to the Division of Medical Quality and delivered to the designated probation surveillance monitor no later than January 31 of each calendar year. Failure to pay costs within 30 days of the due date shall constitute a violation of probation.

17. Upon successful completion of probation, respondent's certificate shall be fully restored.

This decision shall become effective on March 22, 2004.

IT IS SO ORDERED this 20th day of February, 2004.



LORIE G. RICE
Chairperson, Panel A
Division of Medical Quality
Medical Board of California

OAH
TRAINING MATERIALS FOR
NEW BOARD MEMBER ORIENTATION
DEPARTMENT OF CONSUMER AFFAIRS

Prepared by
Administrative Law Judges
David Rosenman &
Janis Rovner

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1. Introduction: Most administrative proceedings before the Office of Administrative Hearings are governed by the Administrative Procedure Act, Government Code sections 11370 through 11529, and California Code of Regulations, title 1. [Found at the website for the Office of Administrative Hearings: www.oah.dgs.ca.gov; click the link for “Laws and Programs.”] These Training Materials include summaries and excerpts from these code sections and regulations. (§ = section number)

2. Office of Administrative Hearings: The Office of Administrative Hearings (OAH) functions as the state’s internal “court system.” Over forty Administrative Law Judges (ALJ) staff four regional offices—Sacramento, Oakland, Los Angeles and San Diego. OAH conducts hearings for over 100 state agencies and over 500 local agencies and school districts. For the fiscal year July 2003 through June 2004, OAH opened 8,616 cases and held hearings in 4,511 cases.

3. Pleadings:

A. Accusation: A written statement of charges against the holder of a license or privilege, to revoke, suspend or limit the license, specifying the statutes and rules allegedly violated and the acts or omissions comprising the alleged violations. Government Code section 11503.

B. Statement of Issues: A written statement of the reasons for denial of an application for a license or privilege, specifying the statutes and rules allegedly violated and the acts or omissions comprising the alleged violations. Government Code section 11504.

C. Petition for reinstatement or reduction of penalty: A person whose license was revoked, suspended or placed on probation can petition for that license to be reinstated, to have the penalty reduced, or for the probation to be terminated. Many boards have specific statutes or regulations relating to these petitions. Hearings on these petitions usually take place before the board itself at a scheduled board meeting, with an ALJ presiding. The board usually goes into closed session after the hearing to deliberate and decide the outcome. The ALJ usually prepares the Decision, for signature of the board chairperson. Some Boards have the authority to permit the ALJ sitting alone to hear petitions and render a proposed decision to the Board. This may also happen when the board does not have a quorum at a board meeting. Government Code sections 11517, 11522.

4. Proposed Decision:

A. ALJ’s action: After the hearing, the ALJ will issue a Proposed Decision that includes the factual and legal basis for the decision. The factual basis for the decision must be based exclusively on the evidence in the hearing record, that is, the testimony and all exhibits received into evidence. The proposed decision will also include a recommended order that will (1) uphold the discipline or license denial the Board’s attorney and/or staff have advocated, (2) modify the

discipline or denial to include something less or more than Board staff and/or attorney advocated, or (3) dismiss the case in its entirety. Penalties in the decision's order may not be based on any guidelines or policy memos that have not been adopted as regulations. Government Code section 11425.50.

B. Board's action: OAH will forward the Proposed Decision (PD) and the exhibits from the hearing to the board. The board has several options upon receipt of the PD: adopt all of the PD; reduce the penalty and adopt the rest of the PD; make technical or minor corrections and adopt the PD; reject the PD, order a transcript, and remand the matter back to the ALJ to take further evidence and write a new PD; or reject the PD, order a transcript (or not, if the parties agree), and decide the case itself based on the record. Government Code section 11517.

5. Settlements: The licensee/applicant and agency may decide to settle at any time during the administrative process. Usually, settlements are entered into before an administrative hearing is held to avoid the expense of the hearing. The settlement is reduced to a written stipulation and order which sets forth the settlement terms and proposed disciplinary order. The written stipulation and order is forwarded to the Board for its consideration. During the settlement process the Deputy Attorney General has been advised by the agency's executive officer or head of enforcement regarding acceptable terms. The Deputy Attorney General may advocate before the Board for approval of the settlement. The Board may accept the settlement and issue its decision and order based on the settlement. If the Board rejects the settlement, the case will return to the disciplinary process. A new settlement may be submitted to the Board at a later time or the case may proceed to an administrative hearing before an ALJ. Government Code section 11415.60.

6. Disqualification: With some limited exceptions, a board member cannot decide a case if that board member investigated, prosecuted or advocated in the case or is subject to the authority of someone who investigated, prosecuted or advocated in the case. A board member may be disqualified for bias, prejudice or interest in the case. Government Code sections 11425.30, 11425.40.

7. Ex Parte Communications: "Ex parte" technically means "by or for one party only." In practice, it is a limitation on the types of information and contacts that board members may receive or make when considering a case. While a case is pending, there are only limited types of communications with board members that are allowed if all parties are not aware of the communication and do not have a chance to reply. For example, a board member can accept advice from a staff member who has not been an investigator, prosecutor or advocate in the case; but that person/staff cannot add to, subtract from, alter or modify the evidence in the record. Or, a board member can accept information on a settlement proposal or on a procedural matter. Most other communications may need to be disclosed to all parties, and an opportunity will be provided to the parties make a record concerning the communication. Disclosure may also apply to communications about a case received by a person who later becomes a board member deciding the case. Receipt of some ex parte communications may be grounds to disqualify a board member.

Government Code section 11430.10:

“(a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.

(b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

(c) For the purpose of this section, a proceeding is pending from the issuance of the agency's pleading, or from an application for an agency decision, whichever is earlier.”

Government Code section 11430.20:

A communication otherwise prohibited by Section 11430.10 is permissible in any of the following circumstances:

(a) The communication is required for disposition of an ex parte matter specifically authorized by statute.

(b) The communication concerns a matter of procedure or practice, including a request for a continuance, that is not in controversy.

Government Code section 11430.30:

“ A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

(a) The communication is for the purpose of assistance and advice to the presiding officer from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. An assistant or advisor may evaluate the evidence in the record but shall not furnish, augment, diminish, or modify the evidence in the record.

(b) The communication is for the purpose of advising the presiding officer concerning a settlement proposal advocated by the advisor.

(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative proceeding that is nonprosecutorial in character:

(1) The advice involves a technical issue in the proceeding and the advice is necessary for, and is not otherwise reasonably available to, the presiding officer, provided the content of the advice is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water Resources Control Board, or a regional water quality control board.”

Government Code section 11430.40:

“If, while the proceeding is pending but before serving as presiding officer, a person receives a communication of a type that would be in violation of this article if received while serving as presiding officer, the person, promptly after starting to serve, shall disclose the content of the communication on the record and give all parties an opportunity to address it in the manner provided in Section 11430.50.”

Government Code section 11430.50:

“(a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:

(1) If the communication is written, the writing and any written response of the presiding officer to the communication.

(2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication.

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.

(c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.”

Government Code section 11430.60:

“Receipt by the presiding officer of a communication in violation of this article may be grounds for disqualification of the presiding officer. If the presiding officer is disqualified, the portion of the record pertaining to the ex parte communication may be sealed by protective order of the disqualified presiding officer.”

Government Code section 11430.80:

“(a) There shall be no communication, direct or indirect, while a proceeding is pending regarding the merits of any issue in the proceeding, between the presiding officer and the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) This section does not apply where the agency head or other person or body to which the power to hear or decide in the proceeding is delegated serves as both presiding officer and agency head, or where the presiding officer does not issue a decision in the proceeding.”

8. Additional Hypotheticals/Issues

The responses to these hypothetical questions are not intended to be definitive. Rather, they are intended to sensitize Board members to the variety of situations they may face, and suggest the process Board members should follow in formulating a response when they find themselves in similar situations.

- A. A Board member discovers during the Board's consideration of a case that his/her spouse served as the Board's expert witness during the administrative hearing before the ALJ. The Board member was not appointed to the Board until after the administrative hearing took place and the proposed decision was issued. What should the Board member do? Do other members of the Board have any obligations?
- The Board member whose spouse served as the expert should disqualify (recuse) himself/herself from the case and should not be privy to any further Board deliberations regarding the case. Nor should the member discuss the case with any other member.
 - The reason for the Board member's recusal should probably be disclosed to the parties in the case, reduced to writing, and sealed as part of the record in the case in the event the decision is appealed (although technically there may not be a legal requirement to take these steps).
 - Other Board members may continue to serve as long as they are unbiased with respect to the case.
- B. An ALJ is sitting with the entire Board during a hearing on a licensee's petition to have his license reinstated. As the licensee is testifying, a Board member's cell phone rings, the Board member answers the call, gets up from the table, and goes to another room to talk to the caller. Later, when the Board is considering whether or not to grant the petition, the Board member takes part in deliberations and seeks to have his/her vote counted when voting on whether or not to grant the petition. Should the Board member participate and vote on the petition?
- No. The Board member should disqualify him/herself from further participating and voting in this case. The Board member must be present when evidence in the form of the licensee's testimony is presented.

- C. A Board is considering whether or not to adopt a proposed decision that recommends revocation of a license on the basis of evidence establishing that the licensee has been convicted five times in the recent past of driving under the influence of alcohol. The proposed decision finds that the licensee has admitted to being an alcoholic with a serious drinking problem, but has been receiving treatment for his alcoholism in a residential facility for one year. Two years earlier, a participating Board member announced at a news conference that he would ensure that licensees with substance abuse problems were not allowed to practice the licensed activity. Should this Board member participate in the consideration of this case?
- Probably Not. This is a gray area. On the one hand, if the Board member can decide this case in an unbiased manner based solely on the evidence in the case, he may not be required to disqualify himself. On the other hand, the Board member's previous statement may be evidence of an appearance of bias and it may provide a basis for challenging the Board's decision if the Board member does not recuse himself. It might be best if the Board member recuses himself.
- D. A Board member is told by a close friend that the friend has been called to be a witness for the respondent in a disciplinary proceeding against a Board licensee. The best friend tells the Board member that she had nothing but good things to say about the licensee. What should the Board member do?
- The Board member should disclose to the executive officer or an appropriate enforcement staff person the conversation with the friend as an *ex parte* communication. The name of the friend, the substance of the communication, any response by the Board member and the date and time of the communication must be written in a memorandum and made a part of the record. All parties in the case must be given notice and an opportunity to be heard regarding the communication.
 - The Board member should consider whether he/she can be unbiased in considering the case should it come before the Board for consideration. If not, the Board member would be subject to disqualification.
- E. The Board of Taxidermy is hearing a petition for reinstatement. A former licensee whose license was revoked is seeking reinstatement. After taking evidence about the original charges against, and the rehabilitation of, the petitioner, one of the Board members asks about an unrelated incident. The member had read in the papers that the petitioner had been arrested, but later released, after some local high school students told police that the petitioner had tried to sell them drugs and was saying "creepy things" to them about dead animals. No charges were brought. The Board member becomes persistent and angry in questioning the petitioner about the incident. Should the Board member be permitted to ask the question in the first instance and should the continued persistent and angry questioning continue?

- While asking the first question may be appropriate, the primary purpose of the hearing is to determine the petitioner's rehabilitation from the charges that resulted in his license revocation. The petitioner's arrest, without charges being brought or any conviction, is not part of the record in the case and it would not necessarily be a basis to deny the petition. This is also a situation in which Board members should look to the overriding rule of fairness. After a reasonable inquiry has been made, care needs to be taken so as not to appear biased or unable to review and vote upon the petition in a fair and neutral way. Petition hearings are also a forum where Board members must comport themselves as judges, and they must be fair and appear fair.
- The holdings in two recent cases are also illustrative on the subject of Board hearings: In *Lacy Street Hospitality Services v. City of Los Angeles* (2004) 125 Cal.App.4th 526, the court held that failure of city council members to pay attention during a quasi-judicial hearing on proposed modifications to zoning conditions for an adult cabaret, was a violation of due process and an abuse of discretion. In *Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, a city planning commission's rejection of a real estate project was set aside because a commissioner authored an article attacking the project while it was under consideration, thereby establishing "an unacceptable probability of actual bias" of the commissioner that was sufficient to disqualify him.

Disciplinary Guidelines Example

Speech-Language Pathology and Audiology Examining Committee

DISCIPLINARY GUIDELINES

SPEECH-LANGUAGE PATHOLOGISTS AND AUDIOLOGISTS

Section 1399.178 is added to Division 13.4 of Title 16, Article 6 entitled "Disciplinary Guidelines" of the California Code of Regulations to read:

Article 6. Disciplinary Guidelines

1399.178. Disciplinary Guidelines.

In reaching a decision on a disciplinary action under the Administrative Procedure Act (Section 11400 et seq. of the Government Code) the Committee shall consider the disciplinary guidelines entitled "Disciplinary Guidelines Revised September 3, 1997," that are hereby incorporated by reference. Deviation from these guidelines and orders, including the standard terms of probation, is appropriate where the Committee, in its sole discretion, determines that the facts of the particular case warrant such a deviation -- for example: the presence of mitigating factors; the age of the case; and evidentiary problems.

Note: Authority cited: Section 2531.95, Business and Professions Code, Section 11425.50(e), Government Code. Reference: Sections 2533 and 2533.1 Business and Professions Code; Section 11425.50(e), Government Code.

DISCIPLINARY GUIDELINES

The Committee recognizes that these penalties and conditions of probation are guidelines, and that each disciplinary case must be assessed individually. If individual circumstances exist that justify omissions or deviations from these guidelines, the Committee asks that these be explained by the Administrative Law Judge hearing the case. This will help the Committee to better evaluate proposed decisions and to make decisions that accurately reflect the facts of each specific disciplinary matter.

STANDARD TERMS AND CONDITIONS OF PROBATION (1-13)

1. OBEY ALL LAWS:

Respondent shall obey all federal, state, and local laws, including all statutes and regulations governing the practice of the licensee.

Further, respondent shall, within five (5) days of any arrest, submit to the Committee in writing a full and detailed account of such arrest.

2. COMPLY WITH PROBATION PROGRAM

Respondent shall fully comply with the probation program established by the Committee and shall cooperate with the representatives of the Committee.

3. CHANGE OF ADDRESS NOTIFICATION

Respondent shall, within five (5) days of a change of residence or mailing address, notify the Committee in writing of the new address.

4. OUT-OF-STATE RESIDENCY

Respondent shall notify the Committee immediately in writing if he or she leaves California to reside or practice in another state.

Respondent shall notify the Committee immediately upon return to California.

The period of probation shall not run during the time respondent is residing or practicing outside California.

5. SUBMIT QUARTERLY WRITTEN DECLARATIONS

Respondent shall submit to the Committee quarterly written declarations and verification of actions signed under penalty of perjury. These declarations shall certify and document compliance with all the conditions of probation.

6. NOTIFY EMPLOYER OF PROBATION TERMS AND RESTRICTIONS

When currently employed or applying for employment as a speech-language pathologist or audiologist, respondent shall notify his or her employer of the probationary status of respondent's license. This notification to the respondent's current health care employer shall occur no later than the effective date of the Decision placing respondent on probation. The respondent shall notify any prospective health care employer of his or her probationary status with the Committee prior to accepting such employment. This notification shall be by providing the employer or prospective employer with a copy of the Committee's Decision placing respondent on probation.

Respondent shall cause each employer to submit quarterly written declarations to the Committee. These declarations shall include a performance evaluation.

Respondent shall notify the Committee, in writing, of any change in his or her employment status, within ten (10) days of such change.

7. INTERVIEWS WITH COMMITTEE REPRESENTATIVES

Respondent shall appear in person for interviews with the Committee, or its designee, upon request at various intervals and with reasonable notice. An initial probation visit will be required within sixty (60) days of the effective date of the Decision. The purpose of this initial interview is to introduce Respondent to the Committee's representatives and to familiarize Respondent with specific probation conditions and requirements. Additional meetings may be scheduled as needed.

8. EMPLOYMENT LIMITATIONS

While on probation, Respondent may not work as a faculty member in an accredited or approved school of speech-language pathology or school of audiology.

9. EDUCATIONAL COURSE

Respondent shall take and successfully complete course work substantially related to the violation. The Committee shall, within sixty (60) days of the effective date of the Decision, advise the Respondent of the course content and number of contact hours required. Within thirty (30) days thereafter, Respondent shall submit a plan to comply with this requirement. Respondent must obtain approval of such plan by the Committee prior to enrollment in any course of study.

Respondent shall successfully complete the required remedial education no later than the end of the first year of probation. Upon successful completion of the course, Respondent shall cause the instructor to furnish proof to the Committee immediately.

10. FUNCTION IN LICENSED CAPACITY

During probation, Respondent shall work in his or her capacity in the State of California. If respondent is unable to secure employment in his or her capacity, the period of probation shall be tolled during that time.

11. MAINTAIN A VALID LICENSE

Respondent shall, at all times while on probation, maintain an active current license with the Committee, including any period during which suspension or probation is tolled.

Should Respondent's license, by operation of law or otherwise, expire, upon renewal or reinstatement, Respondent's license shall be subject to any and all terms of this probation not previously satisfied.

12. VIOLATION OF PROBATION

If Respondent violates probation in any respect, the Committee may seek to revoke probation and carry out the disciplinary order that was stayed. The Respondent shall receive prior notice and the opportunity to be heard. If an Accusation or Petition to Vacate Stay or other formal disciplinary action is filed against Respondent during probation, the Committee shall have continuing jurisdiction and the period of probation shall be extended until the matter is final.

13. COMPLETION OF PROBATION

Respondent's license will be fully restored upon successful completion of probation.

OPTIONAL TERMS AND CONDITIONS OF PROBATION (14-26)

14. SUBMIT TO EXAMINATION BY PHYSICIAN

Within sixty (60) days of the effective date of the Decision, Respondent shall submit to a physical examination by a physician of his or her choice who meets minimum criteria established by the Committee. The physician must be licensed in California and Board certified in Family Practice, Internal Medicine, or a related specialty. The purpose of this examination shall be to determine Respondent's ability to perform all professional duties with safety to self and to the public. Respondent shall provide the examining physician with a copy of the Committee's Decision prior to the examination. Cost of such examination shall be paid by Respondent.

Respondent shall cause the physician to complete a written medical report. This report shall be submitted by the physician to the Committee within ninety (90) days of the effective date of the Decision. If the examining physician finds that Respondent is not physically fit to practice or can only practice with restrictions, the examining physician shall notify the Committee within three (3) working days. The Committee shall notify the respondent in writing of the examining physician's determination of unfitness to practice and shall order the Respondent to cease or restrict licensed activities as a condition of probation. Respondent shall comply with this condition until the Committee is satisfied of Respondent's fitness to practice safely and has so notified the Respondent. Respondent shall document compliance in the manner required by the Committee.

15. PSYCHOLOGICAL EVALUATION

Respondent shall participate in a psychiatric or psychological evaluation. This evaluation shall be for the purpose of determining Respondent's current mental, psychological and emotional fitness to perform all professional duties with safety to self and to the public. Respondent shall provide the evaluator with a copy of the Committee's Decision prior to the evaluation. The evaluation shall be performed by a psychiatrist licensed in California and Board certified in

psychiatry or by a clinical psychologist licensed in California approved by the committee.

Within twenty (20) days of the effective date of the Decision, Respondent shall submit to the Committee the name of one or more proposed evaluators for prior approval by the Committee.

Respondent shall cause the evaluator to submit to the Committee a written psychiatric or psychological report evaluating Respondent's status and progress as well as such other information as may be requested by the Committee. This report shall be submitted within ninety (90) days from the effective date of the Decision. Cost of such evaluation shall be paid by the Respondent.

If the evaluator finds that Respondent is not psychologically fit to practice safely, or can only practice with restrictions, the evaluator shall notify the Committee within three (3) working days. The Committee shall notify the Respondent in writing of the evaluator's determination of unfitness to practice and shall notify the Respondent to cease or restrict licensed activities as a condition of probation. Respondent shall comply with this condition until the Committee is satisfied of Respondent's fitness to practice safely and has so notified the Respondent. Respondent shall document compliance in the manner required by the Committee.

If the evaluator finds that psychotherapy is required, Respondent shall participate in a therapeutic program at the Committee's discretion. Cost of such therapy shall be paid for by Respondent.

16. PSYCHOTHERAPY

Respondent shall participate in ongoing psychotherapy with a California licensed psychiatrist, Board certified in Psychiatry, clinical psychologist, marriage, family, and child counselor, or licensed clinical social worker approved by the Committee. Counseling shall be at least once a week unless otherwise determined by the Committee. Respondent shall continue in such therapy at the Committee's discretion. Cost of such therapy shall be paid for by Respondent.

Within twenty (20) days of the effective date of the Decision, Respondent shall submit to the Committee the name of one or more proposed therapists for prior approval. Upon approval by the Committee, Respondent shall commence psychotherapy. Respondent shall provide the therapist with a copy of the Committee's Decision no later than the first counseling session.

If the therapist finds that Respondent is not psychologically fit to practice safely,

or can only practice with restrictions, the therapist shall notify the Committee within three (3) working days. The Committee shall notify the Respondent in writing of the therapist's determination of unfitness to practice and shall notify the Respondent to cease or restrict licensed activities as a condition of probation. Respondent shall comply with this condition until the Committee is satisfied of Respondent's fitness to practice safely and has so notified the Respondent.

Respondent shall cause the therapist to submit quarterly written declarations to the Committee concerning Respondent's fitness to practice and progress in treatment.

17. REHABILITATION PROGRAM

Within thirty (30) days of the effective date of the Decision, Respondent shall enter a rehabilitation and monitoring program specified by the Committee. Respondent shall successfully complete such treatment contract as may be recommended by the program and approved by the Committee.

Components of the treatment contract shall be relevant to the violation and to the Respondent's current status in recovery or rehabilitation. The components may include, but are not limited to: restrictions on practice and work setting, random bodily fluid testing, abstention from drugs and alcohol, use of worksite monitors, participation in chemical dependency rehabilitation programs or groups, psychotherapy, counseling, psychiatric evaluations, and other appropriate rehabilitation or monitoring programs.

The cost for participation in this program shall be paid for by Respondent.

18. ATTEND CHEMICAL DEPENDENCY SUPPORT AND RECOVERY GROUPS

Within five (5) days of the effective date of the Decision, Respondent shall begin attendance at a chemical dependency support group (e.g., Alcoholics Anonymous, Narcotics Anonymous). Documentation of attendance shall be submitted by the Respondent with each quarterly written report. Respondent shall continue attendance in such a group for the duration of probation.

19. ABSTAIN FROM CONTROLLED SUBSTANCES

Respondent shall completely abstain from the personal use or possession of controlled substances as defined in the California Uniform Controlled Substances Act and dangerous drugs as defined in Section 4022 of the Business and Professions Code, except when lawfully prescribed by a licensed practitioner for

a bonafide illness.

20. ABSTAIN FROM USE OF ALCOHOL

Respondent shall completely abstain from the use of alcoholic beverages during the period of probation.

21. SUBMIT BIOLOGICAL FLUID SAMPLES

Respondent shall immediately submit to biological fluid testing paid for by Respondent, at the request of the Committee or its designee. Positive test results will be immediately reported to the Committee.

22. TAKE AND PASS LICENSURE EXAMINATION

Before resuming practice, Respondent shall take and pass the licensure examination currently required of new applicants prior to resuming practice. Respondent shall pay all examination fees.

23. SUPERVISION

The Committee shall be informed and approve of the type of supervision provided while the Respondent is functioning as either a licensed speech-language pathologist or licensed audiologist.

Respondent may not function as a supervisor for any required professional experience (RPE) candidate during the period of probation or until approved by the Committee.

24. RESTRICTIONS ON LICENSED PRACTICE

Respondent shall practice only with a restricted patient population, in a restricted practice setting, or engage in limited practice procedures. These restrictions shall be specifically defined in the Decision and be appropriate to the violation. Respondent shall be required to document compliance in the manner required by the Committee.

25. RECOVERY OF COSTS

Where an order for recovery of costs is made, the Respondent shall make timely payments as directed in the Decision.

26. ACTUAL SUSPENSION OF LICENSE

As part of probation, respondent is suspended from practice for ____ months beginning the effective date of this decision. Respondent shall be responsible for informing his or her employer of the Committee's decision, the reasons for the length of suspension. Prior to the lifting of the actual suspension of license, the Respondent shall provide documentation of completion of educational courses or treatment rehabilitation if required.

PENALTIES FOR DISCIPLINARY ACTIONS

UNPROFESSIONAL CONDUCT (GENERAL)

Sections 480 & 2533 of the Business and Professions Code
Section 1399.180 of the California Code of Regulations, Title 16

MAXIMUM	Revocation or Denial
MINIMUM	18 Months Probation Standard Terms of Probation (1-13) If warranted: Supervision (23) Psychological Evaluation (15) Restricted Practice (24) Suspension (26)

UNPROFESSIONAL CONDUCT -- CONVICTION OF A CRIME OR ACT INVOLVING DISHONESTY, FRAUD, OR DECEIT

Sections 480(a)(1), 480(a)(2), 490 & 2533(a) of the Business and Professions Code

MAXIMUM	Revocation or Denial
MINIMUM	18 Months Probation Standard Terms of Probation (1-13) If warranted: Supervision (23) Psychological Evaluation (15) Restricted Practice (24)

Suspension (26)

UNPROFESSIONAL CONDUCT -- SECURING LICENSE UNLAWFULLY

Sections 498 & 2533(b) of the Business and Professions Code

MINIMUM

Revocation or Denial

Note: The severity of this offense warrants revocation or denial in all cases.

**UNPROFESSIONAL CONDUCT -- USE OR ADMINISTERING TO ONESELF
ANY CONTROLLED SUBSTANCE**

Section 2533(c)(1) of the Business and Professions Code

MAXIMUM

Revocation or Denial

MINIMUM

3 Years Probation

Standard Terms of Probation (1-13)

Physician Exam (14)

Support and Recovery Group (18)

Abstain from Drugs and Alcohol (19-20)

Submit Biological Fluids (21)

Supervision (23)

If warranted:

Psychological Evaluation (15)

Psychotherapy (16)

Drug and Alcohol Rehabilitation (17)

Restricted Practice (24)

Suspension (26)

Note: In some instances public safety can only be assured by removing the licensee from practice. Factors to be considered are: insufficient evidence of rehabilitation, denial of problem, unstable employment history, significant diversion of patients' medications, prior disciplinary action, multiple violations and patient harm.

**UNPROFESSIONAL CONDUCT -- USE OF ANY DANGEROUS DRUGS
SPECIFIED IN SECTION 4211 OF BUSINESS AND PROFESSION CODE,
OR USE OF ALCOHOLIC BEVERAGES EXTENT IMPAIRS ABILITY
TO PRACTICE SAFELY**

Section 2533(c)(2) of the Business and Professions Code

MAXIMUM	Revocation or Denial
MINIMUM	3 Years Probation Standard Terms of Probation (1-13) Physician Exam (14) Support and Recovery Group (18) Abstain from Drugs and Alcohol (19-20) Submit Biological Fluids (21) Supervision (23) If warranted: Psychological Evaluation (15) Psychotherapy (16) Drug and Alcohol Rehabilitation (17) Restricted Practice (24) Suspension (26)

Note: In some instances public safety can only be assured by removing the licensee from practice. Factors to be considered are: insufficient evidence of rehabilitation, denial of problem, unstable employment history, significant diversion of patients' medications, prior disciplinary action, multiple violations and patient harm.

**UNPROFESSIONAL CONDUCT -- MORE THAN ONE MISDEMEANOR
OR ANY FELONY INVOLVING USE, CONSUMPTION, OR SELF-
ADMINISTRATION OF ANY CONTROLLED SUBSTANCES, ALCOHOL,
OR DANGEROUS DRUG**

Section 2533(c)(3) of the Business and Professions Code

MAXIMUM	Revocation or Denial
MINIMUM	18 Months Probation Standard Terms of Probation (1-13) Support and Recovery Group (18)

Abstain from Drugs and Alcohol (19-20)

Submit Biological Fluids (21)

If warranted:

Physical Examination (14)

Psychological Evaluation (15)

Drug and Alcohol Rehabilitation (17)

Supervision (23)

Restricted Practice (24)

Suspension (26)

Note: In some instances public safety can only be assured by removing the licensee from practice. Factors to consider are: conviction of possession of drugs for sale, contribution to delinquency of minors, and other similar offenses.

UNPROFESSIONAL CONDUCT -- FALSE OR MISLEADING ADVERTISING

Section 2533(d) of the Business and Professions Code

Section 1399.185 of the California Code of Regulations, Title 16

MAXIMUM

Revocation or Denial

MINIMUM

18 Months Probation

Standard Terms (1-13)

If warranted:

Supervision (23)

UNPROFESSIONAL CONDUCT -- COMMITTING A DISHONEST OR FRAUDULENT ACT SUBSTANTIALLY RELATED TO QUALIFICATIONS, FUNCTIONS, OR DUTIES OF LICENSEES (Non-Drug Related)

Section 2533(e) of the Business and Professions Code

MAXIMUM

Revocation or Denial

MINIMUM

18 Months Probation

Standard Terms of Probation (1-13)

Supervision (23)

If warranted:

Physician Examination (14)

Psychological Evaluation (15)

Restricted Practice (24)

Suspension (26)

UNPROFESSIONAL CONDUCT BY SPEECH-LANGUAGE PATHOLOGY CORPORATION OR AUDIOLOGY CORPORATION

Section 2537.2 of the Business and Professions Code

MAXIMUM	Revocation or Denial
MINIMUM	18 Months Probation Standard Terms of Probation (1-13)

DISCIPLINARY ACT BY FOREIGN JURISDICTION

Section 141 of the Business and Professions Code

MAXIMUM	Revocation or Denial
MINIMUM	18 Months Probation Standard Terms of Probation (1-13) If warranted: Support and Recovery Group (18) Abstain from Drugs and Alcohol (19-20) Submit Biological Fluids (21) Physical Examination (14) Psychological Evaluation (15) Drug and Alcohol Rehabilitation (17) Supervision (23) Restricted Practice (24) Suspension (26)

SEXUAL MISCONDUCT

Section 726 of the Business and Professions Code

MAXIMUM	Revocation or Denial
MINIMUM	3 Years Probation Standard Terms of Probation (1-13) Supervision (23) If warranted: Psychological Evaluation (15) Psychotherapy (16) Restricted Practice (24) Suspension (26)

**VIOLATION OF REQUIRED PROFESSIONAL EXPERIENCE
(RPE) REGULATIONS**

Sections 1399.162, 1399.163, 1399.164, 1399.166, & 1399.169
of the California Code of Regulations, Title 16

MAXIMUM Revocation or Denial

MINIMUM 18 Months Probation
Standard Terms of Probation (1-13)

**VIOLATION OF LAWS AND REGULATIONS RELATING
TO SPEECH-LANGUAGE PATHOLOGY AND AUDIOLOGY AIDES**

Section 2530.6 of the Business and Professions Code
Sections 1399.171-1399.175 of the California Code of Regulations, Title 16

MAXIMUM Revocation or Denial

MINIMUM 18 Months Probation
Standard Terms of Probation (1-13)

**UNPROFESSIONAL CONDUCT-AIDING AND ABETTING IN
THE COMMISSION OF A VIOLATION OF
AN ACT OR REGULATION**

Section 1399.180(a) of the California Code of Regulations, Title 16

MAXIMUM Revocation or Denial

MINIMUM 18 Months Probation
Standard Terms of Probation (1-13)

**UNPROFESSIONAL CONDUCT-CORRUPT OR ABUSIVE
ACT AGAINST A PATIENT**

Section 1399.180(b) of the California Code of Regulations, Title 16

MAXIMUM Revocation or Denial

MINIMUM 3 Years Probation
Standard Terms of Probation (1-13)
Supervision (23)
If warranted:
 Psychological Evaluation (15)
 Psychotherapy (16)
 Restricted Practice (24)
 Suspension (26)

Note: In some instances public safety can only be assured by removing the licensee from practice. Factors to be considered are: insufficient evidence of

rehabilitation, denial of problem, prior disciplinary action, multiple violations and patient harm.

UNPROFESSIONAL CONDUCT- INCOMPETENCE OR NEGLIGENCE

Section 1399.180 of the California Code of Regulations, Title 16

MAXIMUM	Revocation or Denial
MINIMUM	3 Years Probation Standard Terms of Probation (1-13) Supervision (23) If warranted: Psychological Evaluation (15) Psychotherapy (16) Restricted Practice (24) Suspension (26)

Note: In some instances public safety can only be assured by removing the licensee from practice. Factors to be considered are: insufficient evidence of rehabilitation, denial of problem, prior disciplinary action, multiple violations and patient harm.

RECOMMENDED LANGUAGE FOR ISSUANCE AND PLACEMENT OF A LICENSE ON PROBATION FOR INITIAL LICENSURE AND REINSTATEMENT OF LICENSE

In order to provide clarity and consistency in its decisions, the Speech-Language Pathology and Audiology Examining Committee recommends the following language in proposed decisions or stipulated agreements for applicants who hold a license in another state and for petitioners for reinstatement who are issued a license that is placed on probation.

Suggested language for applicants who are placed on probation:

"The application of respondent _____ for licensure is hereby granted. Upon successful completion of all licensing requirements, a license shall be issued to respondent. Said license shall immediately be revoked, the order of revocation stayed and respondent placed on probation for a period of _____ years on the following terms and conditions:"

Suggested language for applicants who are licensed in another state and are placed on probation:

"The application of respondent for licensure is hereby granted and a license shall be issued to respondent. Said license shall immediately be revoked, the order of revocation stayed and respondent placed on probation for a period of ____ years on the following terms and conditions:"

Suggested language for reinstatement of licensure with conditions of probation:

"The application of respondent _____ for reinstatement of licensure is hereby granted. A license shall be issued to respondent. Said license shall immediately be revoked, the order of revocation stayed and respondent placed on probation for a period of ____ years on the following terms and conditions:"



Roles of the Executive Officer

1. The Executive Officer serves at the pleasure of the Board Members as a whole.
2. Board Members as a whole direct the Executive Officer to implement:
 - Program Administration
 - Budget
 - Strategic Planning
 - Coordination of Meetings

OVERVIEW

DCA Central Administrative Services & Cost Distribution Methodology and The State Budget Process

Presented by DCA Office of
Administrative Services

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7/27/2006

Agenda—By the end of this session you will be familiar with the following information:

- DCA central administrative services
- Board payment process for central administrative services (i.e., “Distributed Cost Methodology”).
- Overview of the State Budget Process
- Closing comments & your questions

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DCA Administrative Services

- DCA provides central administrative services to all DCA boards, bureaus and programs.

Examples of administrative services:

- **Business Services Office** -- contracts, purchasing, facilities management, mailroom, records management, etc.
- **Legal Office** -- assistance on all legal matters and issues.
- **Legislation and Regulations** -- bill analysis, regulation development.
- **Office of Human Resources**-- personnel and pay activities, health & safety, training, labor relations, etc.
- **Fiscal Operations Office**-- budgets, accounting, cashiering, etc.
- **Information Technology**-- PC support, email, internet, intranet, LAN, project management, etc.
- **Communication & Education Services** -- press office, media responses, etc.
- **Division of Investigation**-- investigation services.

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Payment of Central Administrative Services

Each board pays their “share” of DCA centralized administrative services through one or more of the following four distributed cost methodologies:

1. **Fee-for-service** – Board billed directly for actual work performed (e.g., Division of Investigation and Office of Examination Services).
2. **Workload Distribution** – Board pays a share of the total central service costs based on their percentage of the total worked performed.
3. **Distributed Cost Centers** – Used exclusively by the Office of Information Services (OIS) for information technology support services (i.e., 21 cost service centers).
4. **Allocation Based on Positions** – Boards pay a share of the total administrative service costs based on their percentage of positions in relationship to total DCA positions– Used primarily for DCA Office of Administrative Services workload (e.g., personnel, budgeting, accounting, executive office support services, etc.,).

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Example—"Position" Distributed Cost Sharing Methodology

Board	Positions	Board Percent of Total Positions	Total \$100,000 Cost of Central Admin Service
A	100	50%	\$50,000
B	40	20%	20,000
C	40	20%	20,000
D	20	10%	10,000
Totals	200	100%	\$100,000

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State Budget Process -- Overview

State operates on a 12-month fiscal year from July 1 through June 30 in the following three key phases:

- **Budget Development** (June through Dec) – Includes review of “baseline” budget funding and staff to determine if board has sufficient resources to fulfill its statutory responsibilities (e.g., licensure, enforcement, etc.). Budget Change Proposals (BCPs) are also considered for additional resources to address changes in workload and/or proposed policy changes. Board “budget plan” is included in the proposed Governor’s Budget.
- **Budget Implementation** (Jan through July) – Proposed Governor’s Budget submitted to State Legislature on January 10th for their approval. Board’s participate in Legislative Budget Subcommittee Hearing process. Conference Committee also initiated for areas where there are differing actions taken by Senate and Assembly during subcommittee hearing process.
- **Budget Monitoring** (Ongoing) – Once a board’s “budget plan” is approved by the Legislature and Governor, a specified amount of funding is authorized for the board to fund its operations (I.e., “budget act appropriation expenditure authority”). Board’s are responsible throughout the year to ensure that they stay within their authorized expenditure authority.

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How does your “Budget” Relate to your “Fund”?

- **The Budget --- “Your Checking Account”** -- Your “budget” is the amount your board has been appropriated to spend during the fiscal year. Thus, your budget is the “*check*” that comes from your “*fund*” to pay for board costs for the year.
- **The Fund – “Your Savings Account”** – Your fund is where all the fees paid by your regulated professionals and/or industry are deposited (I.e., “revenues”). The fund is located in the State Treasury and earns interest (I.e., State Pooled Money Investment Rate).

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Legal Limits on What a Board Can Spend

- **Per Government Code Section 13324** and Control Section 32.00 of the annual Budget Act, boards cannot expend more than their authorized budget appropriation expenditure amount.
- **Even if a board has more moneys available in their fund** than what they are authorized to expend (I.e., fund reserves), they are still limited to expend up to their budget amount. This is analogous to limiting a person to spend up to their available checking account balance even though there may be more funds available in the savings account.
- **Personal Liability for Over-expending Your Budget** – Agency Secretaries and Department Directors can be held personally liable for the amount of over-expenditure of their budget. This “personal liability” could conceivably extend to board members and their executive officers.

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Closing Comments & Questions

- Executive Officers will be advising and working with you all budget and administrative service issues.
- For additional central administrative service information contact Shelley Thomas, Chief, DCA Office of Administrative Services (916-574-7170), Pam Wortman, DCA Fiscal Officer (916-574-7172) or Bill Young (916-574-7175) for budget issues.
- Thank you!

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